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In the

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 276

SERV-AIR, INC.,
*Petitioner,*

VERSUS

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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July, 1968

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## I.
## JURISDICTION

Petitioner, Serv-Air, Inc. invokes the jurisdiction of this Court by virtue of the provisions of Title 28, Section 1254, U.S.C.A., which provides:

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> "1. By Writ of Certiorari granted upon the Petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

## II.
## OPINION SOUGHT TO BE REVIEWED

This Petition for a Writ of Certiorari is taken for the purpose of procuring a review and it is hoped, a reversal of an opinion delivered by the Circuit Court of Appeals

for the Tenth Circuit (involving the question of enforcement of an order of the National Labor Relations Board), cited as *"Serv-Air, Inc.* v. *NLRB,"* — F.2d —, and a copy of which opinion is attached hereto, as Exhibit A.

## III.
## GROUNDS FOR JURISDICTION

Pursuant to Rule 23 of the Supreme Court, a concise statement of the grounds on which the jurisdiction of this Court is invoked follows:

1. The date of the decree sought to be reviewed, and the time of its entry are as follows:

Date of rendition of the opinion, January 19, 1968;

Date of entry, January 19, 1968.

2. Subsequent to said decree, a Petition for Rehearing was filed by your petitioner on March 8, 1968. On April 29, 1968, the Petition for Rehearing was denied by divided Court (2 to 1) with Justice Wilbur K. Miller dissenting. On April 29, 1968, the Circuit Court acting through Judge Jean Britenstein, entered its Order withholding a mandate for a period of 30 days which was to expire on May 28, 1968. Thereafter, and on May 28, 1968, an Order was entered by the Honorable Byron R. White, Associate Justice of the Supreme Court of the United States, staying the mandate, "pending the timely filing and disposition of a petition for a Writ of Certiorari."

3. The statutory provision which petitioner believes to confer on this Court jurisdiction to review said judgment or decree in question by Writ of Certiorari is as heretofore asserted, Section 1254, Title 28, U.S.C.A.

## IV.
## QUESTIONS PRESENTED FOR REVIEW

The questions presented for review by this Petition are as follows:

1. Was the "serious harm" posted by the Company non-coercive and protected by the "free speech provision" of Section 8(c); and by the free speech (First Amendment) provision of the Constitution of the United States?

2. Do the following communications issued to the Company by the Union during a strike constitute *unconditional* offers to return to work?

(a) "The Union is respectfully demanding that the company cease and desist these unfair practices and to allow all concerned to return to their jobs without any more retaliatory measures being taken against them because of their concerted actions."

and

(b) "The group desires to work but they want their legal rights respected."

3. Does the following communication constitute an "*unconditional* offer to return to work?"

"Be further advised that *they are interested* in returning to their jobs and remaining on their jobs as long as the Company does not create instances that would cause further disturbance."

4. "Whether or not a Company engaged in an extremely sensitive activity, such as the maintenance of multi-million dollar aircraft, must permit the adornment by employees of 'multiple-badges,' and 'pie plate' badges, and affixed 'streamers' to their apparel, resulting in diversion among employees, and in the hazard of possible injection of 'foreign objects' into

the mechanism of such aircraft, even though permitting the wearing of a single uniform union button? And whether or not the wearing of such multiple badges constituted a violation of a valid 'no-solicitation' rule."

5. "Whether or not an election petition circulated in one of the plant shops, simply seeking an election after one year of certification, was an unfair practice on the part of the employer, even though a supervisor participated in such circulation."

6. "Whether or not the employer was guilty of an unfair labor practice under Section 8(a)(3) and (1) of the Act, when, pursuant to a mandatory requirement by the Air Force that it must reduce its maintenance crew by eight men, it objectively selected the two crews consisting of four men each, who had the lowest record of productivity in the plant."

## V.

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

(a) With respect to the "serious harm notice" posted by the Employer in 1960, and held by the Court to be coercive (although the 4th, 6th and D.C. Circuits have held such notices to be well within the realm of the free speech doctrine), the following pertinent Article, Statute, and Regulations are quoted as follows:

(1) The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law * * * abridging the freedom of speech or of the press * * *."

(2) Section 8(c) of the Taft-Hartley Act adopted in 1947 provides:

"Section 8(c). The expressing of any views, arguments, or opinions or the dissemination thereof whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Sub-chapter, if such expression contains no threat of reprisal or force or promise of benefit."

(b) The *"serious harm"* notice posted by the Company in 1960 and maintained throughout, reads as follows:

"Since the Union has been putting on a campaign to get in here, some of you have been asking questions in regard to the following matters. We have decided to state the Company's position on these subjects as clearly as we can for everybody alike:

"(1) This matter is, of course, one of concern to the Company. It is, however, also a matter of serious concern to you and our sincere belief is that if this Union were to come into this Plant, it would not work to your benefit but to your serious harm."

## VI.
## CONCISE STATEMENT OF THE CASE

This case presents six grounds as above set forth for a review of the decision of the Circuit Court for the Tenth Circuit.

The petitioner here, Serv-Air, was petitioner in the Circuit Court, in which it sought a review of an order of the NLRB involving several issues. The Board filed a Cross Complaint, seeking enforcement. The Court overruled the Board on certain issues and overruled the petitioner, Serv-Air in certain instances.

It is only those issues which we deem to be of substantial importance which Serv-Air desires to submit to this Honorable Court for resolution.

There was no question concerning jurisdiction. Serv-Air, Inc. is a corporation which holds a contract with the United States Air Force, for the maintenance of the tangible facilities and the maintenance of a highly intricate powerful and complicated jet engine aircraft complex advanced Air Force Base at Enid, Oklahoma, which is one of the vital locations in the United States Air Force Training Command.

In the discharge of its duties, responsibilities and functions, it employs approximately 1,100 people on the Base. Of this number, only approximately 57 workers are members of the bargaining unit which was certified by the Board on June 12, 1964 as the "Fire Rescue Department." The relationship between these firemen "Smoke Eater's Lodge No. 898" (and the International Association of Machinists AFL-CIO) and this petitioner is the subject of the issues which were involved in the proceedings before the Board and before the Tenth Circuit. This case also involves certain other alleged activities of the Company with respect to other employees in the Maintenance Shops, but which were not certified as bargaining units.

A complaint was filed by the General Counsel concerning certain alleged unfair labor practices on the part of the Company. Hearings were completed before the examiner on April 8, 1965. The examiner rendered his decision on November 18, 1965. The decision was partly in favor of and partly adverse to this petitioner. Exceptions were taken and the Board rendered its decision (161 NLRB No. 17, dated October 25, 1966).

As to those issues which were decided adversely to this petitioner, a Petition for Review was filed with the Tenth Circuit. Briefs were filed. The case was heard before the Honorable Wilbur K. Miller, of the District of Columbia Circuit Court, Judge Britenstein, and Judge Seth, Circuit Judges.

On January 19, 1968, the Circuit Court rendered an opinion, sustaining in part and overruling in part the petition of Serv-Air, Inc. On March 8, 1968, the petitioner filed its petition for rehearing and on April 23, 1968, without argument, the petition for rehearing was denied by a divided Court (two to one) with Justice Wilbur K. Miller dissenting.

## VII.
## ARGUMENT

**No. 1—The "Serious Harm" Notice**

We first proceed to the "Serious Harm" notice.

This was promulgated in 1960 as disclosed by the record, and admitted by the lower court.

Not only this type of notice but the exact language thereof has been upheld by the 4th Circuit in *Wellington Mill Division, West Point Manufacturing Co.* v. *NLRB,* 4th Cir., 330 F.2d 579, *cert. denied* 379 U.S. 882; *Suprenant Manufacturing Co.* v. *NLRB,* 5th Cir., 341 F.2d 756 and *Amalgamated Clothing Workers of America* v. *NLRB,* D.C. Cir., 365 F.2d 898.

All of these decisions were cited to the Circuit Court in addition to:

—*NLRB* v. *Threads,* 308 F.2d 1 (4th Cir.).

It is noted that the 10th Circuit on this issue determined that while the notice is proper and was protected by Section 8(c) when adopted in 1960, "that conduct of the company in 1964 deprived it of that status."

In the Court's decision it mentioned three Circuit Courts which had held this type of free speech non-coercive, the Fourth Circuit, the Sixth Circuit and the D. C. Circuit, and in which cases the respective Courts differed with the Board. That in the atmosphere which existed in 1964, however, the notice "could well be considered as a threat of reprisal."

I am sure that this Court would welcome and consider the suggestion and information, that since the opinion of the Tenth Circuit was rendered on January 19th, there has been a radical departure on the part of the Board in its assessment of the validity of this type of notice, issued by the employer; and that there has also been another case decided by the Fourth Circuit reiterating its position that such notice *is* valid, notwithstanding attendant circumstances.

In the case of *Allied/Egry Business Systems, Inc.*, 169 NLRB 60 (CCH 22,089), decided January 30, 1968, the employer had issued a letter during an organization campaign stating:

> "your company stands very strongly against bringing this union into our plant. We feel that it would be a great mistake at this time, that it could not benefit you or the company and that it could quite possibly cause serious problems and harm to all of us."

In an additional letter during the organizational campaign in 1967 the employer injected the "serious consequences of

strikes and the strike record of the lithographers union." In another letter, is underscored the futility of choosing union representation. In another letter it affirmed the employer's "absolute right" to stand firm in negotiations, and asserted that while "the union can promise you the 'pot of gold at the end of the rainbow' it cannot guarantee you a single thing."

Other letters from the employer stated:

> "Promises of paid professional union organizers do not buy the groceries and clothing for your family or pay the loans on your home. Only the wages you earn from Allied/Egry do those things. And if this * * * union were to win the election there would still be only one way that it could try to force us to agree to any of its demands we thought unreasonable, or which we otherwise couldn't see our way clear to agree to THAT WOULD BE PULLING YOU OUT ON STRIKE. I can assure you that Allied/Egry has no intention of yielding to any such pressures as that—EVER."

It further refers to the reason for closing another plant belonging to the employer as being "another union's strike for 'unreasonable demands' and 'irresponsible goals.'" The union was then charged in the letter with having engaged in 58 strikes over the last three years.

After listing the possibility of permanent replacements and denial of employment benefits during the strike the letter concluded with:

> "Why gamble with your money and the security and the future of yourself, your loved ones, and your company by bringing this new militant international union into our plant and creating a situation that could

> lead to strikes and walk-outs. Such a gamble seems a bad one to me at a time when you and our Petersburg operation stand on the threshhold of what I consider a very bright future with our most experienced and able plant manager at the helm, and our long awaited plant expansion about to commence."

In a subsequent letter the employer claimed that the employees enjoyed:

> "Steady work and better wages and working conditions than anyone in Petersburg, since the plant opened,"

and countered with the question:

> "What would the story have been if you had been out on strike for several months during this time?"

In another subsequent letter employer pointed to strike violence and loss of jobs during a sympathy strike participated in by another local union.

He also stated that he would not give in "to strike pressure," and affirmed his legal right to replace economic strikers.

In one letter he also suggested possible union retaliation against employees; and in another letter asserted that the union was "out to get its hands on the employee's money."

In the face of all of these communications, it is interesting to observe that the Board has completely changed its position and issued its Order on January 30, 1968, holding that the "serious harm" notice and/or letter was still available to the employer as a right of free speech under

the Constitution and under Section 8(c). This, of course, was a drastic departure from its previous holdings in similar cases, where it had held that such notices, when considered in connection with incidents such as described in the *Allied/Egry* case, *supra*, became non-privileged.

It is interesting to note further that on January 12, 1968, the Fourth Circuit again in *Kayser-Roth Hosiery* (57 LC ¶ 12,472) (388 F.2d 979) reiterated its former position taken in *Wellington* (330 F.2d 579). *Threads, Inc.* (308 F.2d 1, 8).

It is therefore to be hoped that in the light of the definite change in stance taken by the Board on this issue, together with the additional decision rendered by the Fourth Circuit in the meantime, that this Court will accept the opportunity to reconcile the conflict which exists among Circuits with respect to the "serious harm" notice. See also *NLRB* v. *TRW-Semiconductors, Inc.* (9th Cir.), No. 21549 (1967), 56 LC ¶ 12,299, 385 F.2d 753.

The Tenth Circuit holds, however, that the Board has urged that this rule, which has been upheld by four Courts should not be applied in the instant case, and apparently relies upon the *Amalgamated Clothing Workers* case, *supra*.

The Court admits that the notice was proper and was protected by Section 8(c) when adopted in 1960, but that the "conduct of the company in 1964 deprived it of that status."

The only authority mentioned by the Court in support of this position is *Amalgamated Clothing Workers, supra*.

In that case, the Company, as the Court found, was guilty of certain other unfair practices, such as interrogation; but in *Amalgamated,* the Court still upheld the notice.

Here we have three Circuit Courts and four separate cases upholding the validity of the "Serious Harm" notice.

In *Serv-Air,* the 10th Circuit has disagreed in substance with three other Circuit Courts.

Its reliance on *Amalgamated, supra,* we must submit, is a nebulous and "quicksand" foundation for support.

We further submit that an employer under the First Amendment to the Constitution and under Section 8(c) of the Act, has the right to say what he wants to say about the Union, so long as there is no threat of reprisal.

Certainly there is no such threat contained in this notice; and the notice cannot be impregnated with any other unarticulated feelings of the employer—regardless of what they might be.

On this question alone, we submit that *certiorari* should be granted and the higher decision of the 10th Circuit reversed.

**Nos. 2 and 3—Offers to Return to Work**

Questions 2 and 3, although involving separate incidents, involve the same issue, to-wit: Whether or not the Communications presented to the Company, constituted *unconditional* offers to return to work.

The situation under the question presented under No. 2 was that the employees in the "Base Shop" had walked

out on September 3 which was on Thursday. On Friday, September 4, the Company received from the Union a telegram as quoted in "Questions Presented for Review" subparagraph 2(a). September 5 was Saturday, a non-working day. September 6 was Sunday, a non-working day. September 7 was Labor Day, a non-working day and September 8 was the first working day after offer to return. There were many preparations to be made if the employees were to return, after they had unceremoniously left their work; but they did return to work on September 9. The Board held and the Tenth Circuit agreed that the telegram of September 4 was an *unconditional* offer to return to work; and that the Company should have accepted them back that day, and would be liable for wages from September 4 until September 9.

It was and is the position of the Company that the telegram of September 4 was not an *unconditional* offer to return to work.

The acceptance of the terms of such an offer of course would mean that the Company was tacitly admitting:

(a) That it had committed any unfair practice;

(b) That it had taken any "retaliatory" measures against any of the employees.

The offer was therefore not absolute. It was not without reservation. It was not without conditions.

Consequently, it was not an unconditional offer.

The word "unconditional" is defined in Webster's 20th Century Dictionary unabridged, 2nd Edition, as follows:

*"Without conditions or reservations; absolute."*

The Board and the Court we submit were therefore in error in adjudging this employer to be liable for back pay, not only during the non-working days, but for any period from September 4 to September 9 for refusing to accede to this *conditional* offer to return.

With respect to the Question Presented for Review as No. 3, this also involved a communication which the Union contended constituted an *unconditional* offer to return to work.

The situation in this instance was that the firemen (who were members of the Union or the Fire and Rescue Department and which was a certified unit for the Company) had walked off the job on September 14. On September 15, the Company received a telegram from the Union as follows:

> "Be further advised that they are *interested* in returning to their jobs and remaining on their jobs as long as the Company does not create new instances that would cause further disturbance." (Italics ours.)

The same argument would apply to this telegram as to the one referred to in the preceding paragraph. The Union only stated that the people "are interested" in returning to their jobs. The Union did not state that they were offering to return to their jobs. The mere fact that a person might say to a salesman that he is interested in buying a car is certainly not an unconditional offer to buy a car. By no stretch of the imagination could this telegram be accepted as an *unconditional* offer to return to work, as we understand the law of contracts in this country.

Furthermore, by the acceptance of such an offer, the company would be in the position of admitting that it had "created" a present disturbance, and which could have been made to serve an unfair charge.

The company had not created this instance, and certainly it was not going to be placed in a position of having admitted that it had.

This was therefore not the type of unconditional offer to return to work which is contemplated under the decisions.

**No. 4—The Badge Incident**

This involved an incident relating to the wearing of multiple unorthodox badges by men in the engine maintenance section. As a result of this clownish episode, which occurred between October 19 and October 23, petitioner was obliged to terminate 16 men. These men later were accepted back to work by petitioner. The Board, however, has ordered that they be made whole for the time lost, holding that this Company had no right to restrict the number, size or appearance of these multiple badges. The decision of the Board was sustained by the Tenth Circuit.

In this case the company did not restrict the wearing of one ordinary conventional badge indicating union affiliation or any other affiliation. It did, however, and justifiably so, restrict the wearing of multiple badges which began to assume the proportions of a very difficult problem on or about October 19 and October 20. The people in the engine shops had not been certified as a bargaining unit; but they were apparently engaged in an organizing cam-

paign. The members of the union in the shops and certain employees of the company in the shops had been wearing a small single badge theretofore, evidencing the direction of their respective sympathies. It was felt by the company that one badge was certainly sufficient to announce to all the workers in the plant the attitude of the wearer toward the union. It was felt that so long as an employee was permitted to wear one badge disclosing his affiliation or his sympathy he was not being deprived of his right of free speech.

The turning point came, however, when the employees involved, began to make a mockery of the rules relating to appearance, discipline, interference with work, safety, and the No-Solicitation Rule, by wearing multiple badges consisting of various types and sizes, and even including certain home-made "pie plate" types of badges, and even large, taped-on signs across the back of their shirts or jackets. (See R. 1074.)

All of these antics distracted other employees from their work.

There was also the possibility of the injection of foreign objects into expensive and highly-sensitive aircraft motors being worked on (see Testimony of Major John C. Trobaugh, R. 99, *et seq.*, and Major Eugene Bartolich, Staff Maintenance Officer), who testified to what could happen to the blades in a compressor by the injection of even a small foreign object into the engine and who identified certain Exhibits 12(a) through 12(c), being actual photographs of engine blades which had been atrociously damaged by the injection of a foreign object, and which would endanger the life of a pilot.

The principal cases involving this type of multiple badge wearing are as follows:

—*NLRB* v. *Floridan Hotel of Tampa, Inc.*, 218 F.2d 545 (5th Cir. 1963);

*NLRB* v. *Essex Corporation*, 245 F.2d 589, 9th Cir.;

*Murphy-Diesel* case, 36 LC ¶ 65792, 263 F.2d 301;

*NLRB* v. *Harrah's Club*, 143 NLRB 1356, 337 F.2d 177 (1963).

It is interesting to note that one of the principal cases upon which the Examiner relied (*Fabri-Tek, Inc.*, 148 NLRB 156) with respect to the wearing of oversized badges, was later reversed by the 8th Circuit (352 F.2d 577).

This is a very analogous case, to *Serv-Air.*

*Fabri-Tek* was in the business of manufacturing magnetic memory devices for the computer or digital equipment industry. The finished product was extremely complex and each item must operate perfectly to enable the ultimate mechanism to function. It is also undisputed in that case that each step in the fabrication of a "memory frame" is done by hand and required a high degree of concentration during its performance. These intricate pieces were required to be absolutely "perfect." The intricacy of this work is analogous to the extreme precision work required on the workover of the aircraft engines at Serv-Air. A high degree of concentration, the Court found, "is required on the part of the employees and distractions of any kind might very well lead to inefficiency, work slowdown, and costly errors."

In the *Fabri-Tek* case, certain employees began to wear three types of buttons: one, a large round button of the type usually used in political campaigns, which apparently was very similar to one of the buttons constituting an exhibit in the *Serv-Air* case, about 3 inches in diameter; then, a square two-inch button; and, then the customary Union button. In addition to these buttons, there was a blouse being worn by some of the employees on which was stencilled on the back the words "Vote IBEW" in black, 2½-inch letters.

In the *Fabri-Tek* case, as in the *Serv-Air* case, management did not object to the wearing in an ordinary way of the customary Union button. However, when it became apparent that these multiple buttons and signs were being used for the obvious purpose of attracting the attention of other employees the Company issued a memorandum very similar to the Administrative Circular No. 9 introduced in evidence in this case, and appearing on page 23 of the Examiner's decision.

As in the *Serv-Air* case, *Fabri-Tek* also had in force and effect a long-standing "no-solicitation rule."

Just as in the *Serv-Air* instant case, *Fabri-Tek* contended:

(1) that the wearing of such multiple and unorthodox buttons and signs constituted a violation of its No-Solicitation Rule; and

(2) that the wearing of such oversized buttons produced a distracting influence which would affect the efficiency and the precision performance of the employees.

This case was tried before three eminent Circuit Judges of the 8th Circuit with Chief Judge Vogel writing the opinion, in which both Judge Mathes and Judge Ridge concurred.

In disposing of the issue as to whether the wearing of these oversize badges constituted "solicitation," the opinion stated:

> "We think that the wearing of the various oversize insignia was definitely a form of solicitation and campaigning in behalf of I.B.E.W., that that was the only meaning such type of insignia and activities could have had, and that it was in violation of the company's rule against soliciting or campaigning on company time."

In this connection, it will be observed, of course, from the recommended decision of the Examiner, that he very justifiably agrees with Serv-Air that its long-standing "No Solicitation" Rule was valid and enforceable.

Since Serv-Air did have a valid No-Solicitation Rule, in effect, then based upon this very recent and significant decision in *Fabri-Tek,* it must necessarily follow that the wearing of these oversized multiple badges and signs constituted a form of solicitation, and was in violation of our No-Solicitation rule.

The inescapable conclusion then is that we had a perfect right to discharge, lay-off, or terminate the sixteen people who declined to remove these emblems of solicitation.

In addition to that ground, it is obvious from the decision in the *Fabri-Tek* case, that we were also justified and

doubly justified in the lay-off or termination of these people by reason of the distractions caused by the wearing of such unorthodox symbols, on the ground that they constituted a special circumstance consisting of "distractions" to employees.

On this basis, the Court proceeded to state in the *Fabri-Tek* case:

> "As will be discussed in full, we further believe, however, that the company rule as written and enforced banning the wearing of unusual union insignia or usual union insignia in an unusual way is not in violation of the employees' rights under the act because of special considerations and circumstances present in this case, i.e., the importance of eliminating distractions to employees, which distractions could lead to a substantial increase in poorly produced memory devices."

It will also be recalled that in the record, there is testimony that some of the workers were carrying rolled-up newspapers with the word "SCAB" printed on it, obviously, flaunting them before some of the other employees.

In this connection, it is interesting to review the statement of the Court of the 7th Circuit (*Caterpillar Tractor Co.* v. *NLRB,* 230 F.2d 357):

> "We are of the opinion that petitioner's anticipation that the 'SCAB' buttons would prove disruptive of employee harmony in its plant and destructive of discipline in production was fully justified."

Also, in the case of *Republic Aviation Corporation* v. *NLRB,* 324 U.S. 803, the Supreme Court of the United States stated:

"The Act of course does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. *Working time is for work.* It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for discriminatory purposes." (Italics ours.)

The Court in *Fabri-Tek* thereupon continued:

"Clearly petitioner's rule against solicitations was not adapted for discriminatory purposes. The rule was solely designed to prevent distracting the attention of the employees during working time."

It is further interesting to note from *Fabri-Tek*, the quotation of the statement made by one of the witnesses which is almost parallel to the statement made by Mr. Hood, Vice-President and Operating Manager of Serv-Air, when the personnel manager told the witness as stated by her:

"It wouldn't make any difference whether we (Mrs. Heacock and another employee) were wearing non-union buttons or presidential campaign buttons or anything. He said he would have to ask us to take them off—no wheres on the premises."

In conclusion, the Court in *Fabri-Tek* stated:

"Considering the record as a whole, we believe that petitioner's prohibition of the use of the attention-attracting emblems during working time is an entirely reasonable exercise of its rights of management and employee discipline."

Here again, however, we have an instance of a decision of the 10th Circuit adverse to that of the 8th Circuit wherein the 10th Circuit holds (pages 15 and 16 of its opinion):

> "To the extent that *Fabri-Tek, Inc.* v. *NLRB,* 8th Circuit 352 F.2d 577-586, holds that badge wearing may be forbidden under a valid no-solicitation rule, we believe that it runs contrary to the *Republic Aviation* decision."

This matter we submit is a question which should be resolved once and for all by the Supreme Court of the United States.

**No. 5—The Election Petition**

The 10th Circuit admits that this is a "case of first impression."

The facts are that an election petition was circulated throughout the base employees long after one year subsequent to certification, and before any contract had been signed with the Fire and Rescue Department.

The base maintenance personnel and the jet engine maintenance personnel had never been certified as a union. An election had never been held for that group, since 1961, in which the Union did not prevail. There appeared to be some employees in favor of a union and some who were not. As a result there had been some discordance among the ranks; and the employees themselves decided to bring it to a head by circulating a petition for an election. One of the employees who appeared to have some supervisory status but certainly not in the higher echelon, apparently took some minor part in the circulation of the petition.

It was not a petition for decertification because there was no union in that group which had been certified. It was simply an application on the part of the employees to the Board to seek an election. It is unknown whether a majority were for the union or whether a majority were against the union. Enigmatically the District Director denied the petition; but the company was castigated by the union for even having a supervisor, unbeknownst to management, sign the petition and assume a very minor role in its circulation.

This petition and its circulation was stigmatized by the union and by the Board as being an unfair labor practice on the part of the company.

The Court concurred.

We submit that there is no law, and there is no valid rule or regulation which would preclude a minor supervisor from signing such a petition and participating to a limited degree in its circulation.

As the Court stated this is a matter of "first impression," and we submit should be decided by the Supreme Court.

**No. 6—Jet Engine Reduction in Force**

We would respectfully ask the Court to review the decision of the lower court relating to this incident.

It involves the question of whether or not the lay-off of eight men on November 6 on account of the necessary reduction in force, was on account of and by reason of their union activities; or whether it was a justifiable management decision.

It was the contention of the Government that the strict and literal results of the test given by the company were not followed; and that the lay-offs were therefore arbitrary and discriminatory, and on account of union activity.

We submit the testimony and the facts even as found by the Court do not justify this conclusion.

It will be noted from the testimony of Mr. Hill, the Director of Air Craft Maintenance at Vance, as reflected by the findings of the Examiner (page 27), that in the summer of 1965, it became obvious that the 100-hour inspections of the engines, could be increased to 200 hours of periodic inspection intervals. That on or about September 2nd a reduction in work force would therefore be in order.

It will be recalled that these same eight men, on September 3rd, including others, staged a "walk off."

These included Anson, Brockway, Brown, Edwards, Greer, Gooch, Kuhlmeier, Knowlton, Lankard, Kuberskey, Ming, Peckham, Payne, Ringgold and Scaia (Examiner's Decision, page 13).

If Mr. Hill or the company had any intentions of terminating these men or any of them, on account of union activity, they could have done so at that time because they already had notice of the necessary reduction in force.

On October 20th and 21st, when they walked off on account of the "badge incident," the company, if it had any intention of terminating them for union activity, could have done so and assigned as their reason a necessary reduction in force.

Orginally it appeared that there were 16 men who were destined to be laid off, but by November, attrition had taken care of eight of them; which left only a necessary reduction of eight men.

The company assiduously endeavored to retain as many of these people as possible, even though several opportunities obviously presented themselves for termination between September 2nd and November 6th.

We submit, therefore, it cannot be realistically contended that these people were laid off on November 6th for union activity. Had that been the reason, the company had more than two months between September 2nd and November 6th within which to separate them from company service. On the other hand, it is apparent from the record that the company continued to make overtures to the Air Force in a sincere effort to prevent the reductions.

This was a humanitarian act on behalf of the company, and certainly is not indicative of any animosities toward these people.

As to the objectivity of selection, we would urge the Court also to re-analyze the facts here.

It is true that individual surveys and appraisements were made of some 80 employees. It was also true that the company was faced with the task of accomplishing this reduction, so that the men who had to be released, would have the least effect upon the composite productivity and efficiency of the entire JEFM Plant.

The company therefore selected 14 men who had the lowest individual scores in the group, from which to select the eight men who had to be laid off.

Coincidentally, we think it significant to note that all of these 14 low men were people who had walked off the job on September 3rd and presumably were all union sympathizers. They included Brown, Edwards, Peckham, and Ringgold, who so far as the company knew were just as active union people as the others in the group.

In fact, it appeared at one of the meetings with Hill and Sprayberry that Ringgold was the spokesman.

Ringgold was not separated.

Brown was not separated.

Edwards was not separated.

Peckham was not separated.

Scaia and Greer were crew chiefs and each of them had three other men on his crew.

With reference to the production record of these two crews, Examiner found (page 32, Examiner's Decision) that *of all of the full crews* producing in the plant during July, August, September and October, the Scaia crew was the lowest producer in July, August and October, and the second lowest in September; and the Greer crew was the second lowest in July, third lowest in August, and lowest in September and October, tying with the Scaia crew for lowest in the latter month. These facts are not contradicted.

Based upon this completely unsatisfactory productivity record therefore, and since all of the men within those two crews were among the 14 lowest in the individual grading, it would appear to us that it was not only natural and realistic, but pratically mandatory that Mr. Hill and Mr. Sprayberry select these men for the layoff.

In the alleged segregation incident which occurred when the men came back to work on September 9th, the Examiner held and the Board sustained that the company had the right to separate and preserve the autonomy of these crews.

There was therefore nothing unusual nor reprehensible on the part of Mr. Hill and Mr. Sprayberry to select these eight men, who composed the two least productive crews in the plant, and who were among the low 14, to be laid off. In fact, it seems to us it was simply good managerial judgment.

We would hope the Court will re-examine the record and the circumstances involved in this November layoff, and either reverse, or remand for rehearing.

## CONCLUSION

In conclusion we respectfully submit to the Court that this is a case which should receive serious consideration by this Court for the following basic reasons among others, to-wit:

(1). With respect to the "Free Speech" notice there is a definite conflict between the 4th Circuit and the 6th Circuit, on the one hand and the 10th Circuit on the other as reflected in this Petition.

(2). With respect to "MULTIPLE BADGES" there is a definite conflict between the 8th Circuit and the 10th Circuit which should be finally determined by this Court.

(3). With respect to the circulation of a petition for an election among a group of employees who have not been

amalgamated into a certified bargaining unit, it involves a case of first impression.

(4). With respect to what constitutes "an unconditional offer to return to work" it requires a determination.

(5). With respect to the manner in which a company may lawfully terminate personnel when faced with a mandatory reduction in force, it requires determination.

It is therefore respectfully requested that the Writ be granted.

Dated this 3rd day of July, 1968.

FRANK CARTER
*Attorney for Petitioner*

*of Counsel:*
OJTEN & CARTER
Bass Building
Enid, Oklahoma

July, 1968

(Proof of Service Attached Hereto)

SUPREME COURT OF THE UNITED STATES

NO. _____

SERV-AIR, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

TO: Marcell Mallet-Provost,
Counsel for Respondent.

You are hereby notified that a Petition for a Writ of Certiorari in the above entitled cause was filed in the Supreme Court of the United States on the _____ day of July, 1968.

A printed copy of the Record and a printed copy of the Petition and Brief are served upon you herewith.

_____
Petitioner

Service accepted this _____
day of _____, 1968.

_____
Counsel for Respondent

## APPENDIX A

J-4939
Serv-Air, Incorporated

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 9193—JANUARY TERM, 1968

| | |
|---|---|
| SERV-AIR, INC., | ) |
| | ) |
| Petitioner, | ) |
| | ) |
| v. | ) |
| | ) |
| *NATIONAL LABOR RELATIONS BOARD, | ) |
| | ) |
| Respondent. | ) |

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

Frank Carter (Otjen, Carter & Huddleston, Of Counsel, were with him on the brief) for Petitioner

John E. Nevins, Attorney, National Labor Relations Board (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and Glen M. Bendixsen, Attorney, National Labor Relations Board, were with him on the brief) for Respondent.

Before WILBUR K. MILLER,* BREITENSTEIN and SETH, Circuit Judges.

* 10-CA-2122; 161 NLRB 17
Bendixsen/Nevins

* Of the District of Columbia Circuit, sitting by designation.

[APPENDIX]

BREITENSTEIN, Circuit Judge.

Serv-Air, Inc. (the Company), petitions for review of an order of the National Labor Relations Board[1] and the Board requests enforcement of its order. The Company is engaged in the operation and maintenance of all facilities and equipment used in the pilot training program at Vance Air Force Base and auxiliary fields near Enid, Oklahoma. It has about 1,100 employees. The International Association of Machinists (the Union) attempted to organize the employees. As the result of an election held on May 6, 1964, Smoke-Eaters Lodge No. 898, an affiliate of the Union, was designated as the representative of about 85 employees in Fire and Rescue Department of the Company. We are concerned with unfair labor practice charges which arose after that date and continued for a number of months. The charges, and the facts pertaining thereto, are so interrelated that an orderly presentation is difficult.

1. *The No-solicitation Rule.*

In November 1960, the Company posted a notice which stated among other things:

> "No person will be allowed to carry on Union organizing activities on the job. Anyone who does so and who thereby neglects his own work or interferes with the work of others will be subject to discharge."

On September 2, 1964, employees McCarty and Haley were discharged for violation of this rule. The fact that they engaged in conduct forbidden by the rule is not contested. The question is the validity of the rule. The Examiner upheld the rule and the Board reversed.

A no-solicitation rule which only regulates employee activity during working hours is valid unless adopted or used for a discriminatory purpose.[2] The Examiner found,

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[1] See 161 NLRB No. 17.

we believe correctly, that there was no evidence of discriminatory promulgation. The Board said that "no one disputes that the notice was initially promulgated in response to union activity." Standing alone, the fact that an organizational campaign may have begun before the rule was posted does not prove a discriminatory purpose. The rule was in effect for at least three and one-half years before any complaint was made. In effect, the Board infers from occurrences in 1964 that the Company had a bad motive in 1960. We do not deem this to be a reasonable inference.

The Examiner found no discriminatory application of the rule. He did so after denying a proffer of proof by the General Counsel that the rule had been applied discriminatorily. The Board held that the offer should have been received and we agree. The Board went on to hold that discriminatory enforcement was shown by the facts that the Company had condoned solicitations to pay for flowers sent to widows of deceased employees and had on one occasion discussed with a group of employees the handling of Community Chest and Red Cross contributions through payroll deductions. In our opinion, these beneficent acts fall far short of establishing forbidden discrimination.

The holding of the Board that the no-solicitation rule was discriminatorily promulgated and enforced in violation of § 8(a)(1) is reversed and the case remanded for such further proceedings as are appropriate on the issue of the allegedly discriminatory promulgation and enforcement of the rule. This requires that the Board decision that McCarty and Haley were discharged in violation of § 8(a)(1) and (3) be also set aside. If the rule was enforceable, the discharges were proper. Determination of the question of

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[2] See Republic Aviation Corp. v. National Labor Relations Board, 324 U.S. 793, 803-805; National Labor Relations Board v. American Coach Company, 10 Cir., 379 F.2d 699, 701; and National Labor Relations Board v. Shawnee Industries, Inc., 10 Cir., 333 F.2d 221, 225.

discriminatory discharge must await the reconsideration of the validity of the rule.

2. *The "Serious Harm" Notice.*

The printed notice which contained the no-solicitation rule included the following statement:

> "Since the Union has been putting on a campaign to get in here, some of you have been asking questions in regard to the following matters. We have decided to state the Company's position on these subjects as clearly as we can for everybody alike:
>
> (1) This matter is, of course, one of concern to the Company. It is, however, also a matter of serious concern to you and our sincere belief is that if this Union were to come into this Plant, it would not work to your benefit but to your serious harm."

Three circuits have held that this type of notice is non-coercive and is protected by the "free speech" provision of § 8(c).[3] The board urges that the rule announced should not be applied in the context of threats and other unfair labor practices. This distinction was suggested by the District of Columbia Circuit in Amalgamated Clothing Workers of America v. National Labor Relations Board, D.C. Cir., 365 F.2d 898, 910, and in our opinion is valid. Our view is that the notice was proper and was protected by § 8(c) when adopted in 1960 and that the conduct of the Company in 1964 deprived it of that status. In the atmosphere existing in 1964, the notice could well be considered as a threat of reprisal. The inference of the Board that the

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[3] See Wellington Mill Division, West Point Mfg. Co. v. National Labor Relations Board, 4 Cir., 330 F.2d 579, 583, cert. denied 379 U.S. 882; Surprenant Manufacturing Company v. National Labor Relations Board 6 Cir., 341 F.2d 756, 758-759; and Amalgamated Clothing Workers of America v. National Labor Relations Board, D.C. Cir., 365 F.2d 898, 909-910.

notice was then a threat violative of § 8(a)(1) is reasonable and the order will be enforced in this regard.

3. *Refusal to Reinstate Base Shop Employees after Strike.*

After the September 2, 1964, discharge of McCarty and Haley, some employees at the base shop walked out and were joined later by others. The strikers authorized a Union representative to make an unconditional offer to return to work on September 8. The Company did not permit them to return until September 9.

The question of whether we are concerned with an unfair labor practice strike or an economic strike is immaterial because no replacements were hired. The Company was obligated to reinstate the strikers when they unconditionally applied for reinstatement.[4] The question is whether the application for reinstatement was unconditional.[5] The offer to return to work on September 8 concluded with this language:

> "The union is respectfully demanding that the company cease and desist these unfair practices and to allow all concerned to return to their jobs without any more retaliatory measures being taken against them because of their concerted action."

After the Company refused to allow the strikers to return on the 8th, they sent a second message which, among other things said:

> "The group desires to work but they want their legal rights respected."

On September 9, they were all back to work.

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[4] National Labor Relations Board v. Fotochrome, Inc., 2 Cir., 343 F.2d 631, 633, cert. denied 382 U.S. 833.

[5] See National Labor Relations Board v. MacKay Radio and Telegraph Co., 304 U.S. 333, 345; National Labor Relations Board v. Fotochrome, Inc., supra note 4; National Labor Relations Board v. Brown & Root, Inc., 8 Cir., 203 F.2d 139, 147.

The Company says that the offer to return was conditional and that an acceptance would have been an admission by the Company that it had engaged in unfair labor practices. We do not agree. The offer was not conditioned upon any major concession such as a consent election or the execution of a contract and did not request any change in wages, hours, or working conditions. Of some relevance is the fact that on September 8 the strikers appeared for work at the normal hour and place.[6] The Company's reliance on American Ship Building Co. v. National Labor Relations Board, 380 U.S. 300, is misplaced. That case related to a lockout used as an employer weapon to strengthen its bargaining position after impasse in bargaining. The lockout here occurred because the Company did not like the terms of the application for reinstatement. An objective view convinces us that the application was unconditional and the lockout was impelled by a discriminatory motive.[7] The holding of the Board that the lockout violated § 8(a)(3) and (1) is affirmed.

4. *The Refusal to Reinstate the Firemen.*

On September 14, 1964, 57 employees of the Fire and Rescue Department walked off their jobs, assertedly because the Company had refused to hear certain grievances. On September 15 they notified the Company that they would return to work "as long as the Company doesn't create new instances that would cause another disturbance." On September 17 they presented an application suitable to the Company and were back to work on the 18th. The Company says that the September 15 notice was conditional and, hence, it was not bound to accept it. Here again the offer to return was not made contingent upon the

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[6] See Olin Industries, Inc. v. National Labor Relations Board, 5 Cir., 191 F.2d 613, 617, cert. denied 343 U.S. 919.

[7] See National Labor Relations Board v. R. C. Can Company, 5 Cir., 328 F.2d 974, 982.

grant of any concessions or benefits. For the reasons stated in regard to the base employees, we believe that the request for reinstatement was unconditional and the lockout on September 16 and 17 was discriminatory and a violation of the Act. This portion of the Board's order is affirmed.

5. *Discharges for Multiple-Badge Wearing.*

In connection with Union organizational activities Union adherents began to wear insignia signifying allegiance to the Union. These took various forms, such as pencils worn with a union clip showing, plastic badges, improvised badges pasted on plastic buttons, and signs attached to the back of a shirt or jacket. The Company countered with badges indicating that no union was wanted and distributed them to both employees and officials. Some employees then defaced and wore the Company badges. On October 15, 1964, Company supervisors began asking employees not to wear multiple badges. Between October 19 and 20, ten employees were clocked out for refusal to remove multiple insignia. On October 20, the Company posted a notice directing that only one badge be worn. In the next three days, 26 employees were terminated for violation of the notice. On October 27, the badge rule was suspended and everybody went back to work. The whole episode shows an immature approach to labor relations by both the Company and the Union.

The right to wear union insignia on the employer's premises during working hours is guaranteed by §7[8] in the absence of special considerations.[9] The Company says that special considerations justified its actions.

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[8] Republic Aviation Corp. v. National Labor Relations Board, 324 U.S. 793, 801-803.

[9] See National Labor Relations Board v. Essex Wire Corp., 9 Cir., 245 F.2d 589, 593; National Labor Relations Board v. Floridan Hotel of Tampa, Inc., 5 Cir., 318 F.2d 545, 548-549; and National Labor Relations Board v. Harrah's Club, 9 Cir., 337 F.2d 177, 180.

It first relies on the claim that the buttons were disruptive of harmony among the employees and, hence, under Caterpillar Tractor Co. v. National Labor Relations Board, 7 Cir., 230 F.2d 357, were excepted from the general rule. The Board correctly rejected the argument. The Company itself contributed to the disruption, if any, by distribution of its "no union wanted" buttons. The only showing of disharmony is the testimony of a supervisor without any enlargment as to the time, place, or circumstances of the disharmony. The Company's reference to the carrying by employees of rolled-up newspapers on which the word "scab" appeared is irrelevant because the multiple-badge rule in issue does not purport to cover such activities. The Caterpillar case, Id., 230 F.2d at 359, says that an employer may not restrict "passive inoffensive advertisement of organizational aims." The buttons with which we are concerned fall within this category.

The Company urges that the prohibition of multiple badges was proper to lessen the danger of foreign objects falling into jet engines. Fabri-Tek, Inc. v. National Labor Relations Board, 8 Cir., 352 F.2d 577, 586, holds that danger to plant processes can be a valid reason for restrictions on wearing of union buttons. The facts here do not justify the application of that principle. The Company permitted loose objects to be carried in the front pockets of shirts. It allowed multiple badges to be worn for about three months before taking any adverse action. It distributed its own badges. One employee discharged for violation of the rule pushed a lawn mower rather than repaired a jet engine. The Company fails to convince us that it had real concern over the foreign-object danger.

The Company contends that the rule was necessary in order that the employees present a responsible appearance to the Air Force instead of "looking like a bunch of clowns" because of all the badges. The argument that employees have no right to wear union insignia that are offensive to customers[10] does not apply here. The record shows that the

Company acted because of pique and not because of customer relations. It failed to take action against multiple badges for several months and contributed to the carnival atmosphere by the distribution of its own badges.

The claim that the badge wearing was a violation of the no-solicitation rule does not impress us. The courts have generally held that the wearing of union insignia is a form of expression protected by § 7 rather than a form of solicitation.[11] To the extent that Fabri-Tek, Inc. v. National Labor Relations Board, 8 Cir., 352 F.2d 577, 586, holds that badge wearing may be forbidden under a valid no-solicitation rule, we believe that it runs contrary to the Republic Aviation decision.

We agree with the Board that the multiple-badge rule violated § 8(a)(1) and that the discharges for violation of that rule discriminated against the affected employees in violation of § 8(a)(3).

6. *The Election Petition.*

Between October 1964, and January 1965, there was circulated among the employees a petition requesting that a representation election be conducted by the Board's regional director. Among others engaged in this activity were Klepfer and Huston. The Board finding that they were supervisors and that the Company was charged with responsibility for their acts accords with the principles which we stated in Furr's, Inc. v. National Labor Relations Board, 10 Cir., 381 F.2d 562, 565-566, cert. denied — U.S. —, and is supported by the record.

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[10] See National Labor Relations Board v. Harrah's Club, 9 Cir., 337 F.2d 177, and National Labor Relations Board v. Floridan Hotel of Tampa, Inc., 5 Cir., 318 F.2d 545, 549 (dissenting opinion of Judge Lewis).

[11] See Republic Aviation Corp v. National Labor Relations Board, 324 U.S. 793, 802 n. 7; National Labor Relations Board v. Mayrath Co., 7 Cir., 319 F.2d 424, 426; National Labor Relations Board v. Power Equipment Co., 6 Cir., 313 F.2d 438, 442.

The Company urges that the Union may not complain of an opportunity to participate in a free election to determine its status. The Board counters with the claim that Company solicitation of signatures to procure a certification election interferes with the employees' § 7 right to choose a union. Neither party supports its arguments by reference to any court decision on this particular point. Neither the rule that the Board will not conduct a representation election at a time when the employer is charged with an unfair labor practice which might affect the election outcome[12] nor the rule that an employer may not seek signatures for a decertification petition[13] is decisive under the facts presented.

Like many first-impression decisions, the choice here is difficult and requires consideration of general principles. A union organizational campaign is not carried to fruition overnight. It may continue for a prolonged period. If an employer may induce employees to call an election, it may be able to force an election on a union in the beginning of the campaign and before the union has a real chance to bring its views before the employees. Once an election is lost, the union may not seek another for one year[14] and is barred from organizational picketing for a like period.[15] The Act gives an employer no unrestricted right to secure an election.[16] When these considerations are viewed against a background of animus against the Union and a variety of unfair labor practices, an approval of Company solicitation of signatures to an election petition would per-

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[12] See Furr's, Inc. v. National Labor Relations Board, 10 Cir., 350 F.2d 84, 85.

[13] See National Labor Relations Board v. W. R. Hall Distributor, 10 Cir., 341 F.2d 359, 362.

[14] § 9(c)(3).

[15] § 8(b)(7)(B).

[16] See § 9(c)(1)(B).

mit the Company to profit by its improper actions.[17] We conclude that supervisory sponsorship of the election petition interfered with the employees' § 7 rights and violated § 8(a)(1).

7. *The Jet Engine Field Maintenance (JEFM) Layoffs.*

In 1964, it became apparent that the jet engines maintained by the Company would need servicing only half as often as was the practice theretofore. A new contract was negotiated between the Air Force and the Company. In November, eight employees engaged in the JEFM program were terminated. The Board does not dispute the fact that economic considerations caused the layoffs but says that those laid off were discriminatorily selected.

Before acting, Company supervisors made a comprehensive rating of affected employees on such bases as seniority, production, attitude towards supervision, and harmony with co-workers. The factors of attitude and harmony are paricularly sensitive when applied to leaders in an organizational campaign. Union activity does not entitle an employee to special immunity. At the same time such activity makes difficult the objective rating of any employee by an employer. All eight men laid off were Union stewards and had been prominent in the activities previously mentioned. An examination of the rating sheets shows that the scores were disregarded rather than applied. On the record presented we must accept the Board's conclusion that the true reason for the selective layoffs was the elimination of active union leadership and violated § 8(a)(3) and (1).

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[17] Cf. Franks Bros. Co. v. National Labor Relations Board, 321 U.S. 702, 704-705.

8. *The Chodrick Layoff.*

A reduction in the number of firemen was made necessary by the closing of Perry Field, one of the auxiliary bases. A rating system similar to that used for the JEFM workers was followed. The employees in the Fire and Rescue Department were represented by an affiliate of the Union and all were Union members. The layoff of Chodrick is said to be discriminatory because he was active in union affairs and had more seniority than some of those retained. No showing is made that seniority had to be observed in the layoffs. The claim of discrimination is not reasonable to us. All the firemen were Union members and necessarily those laid off belonged to the Union. Chodrick was reinstated when the first opening occurred. We conclude that the layoff of Chodrick did not violate § 8(a)(3) and (1) and that as to him the Board's order should not be enforced.

9. *Questioning of Employees and Disparagement of the Union.*

The Examiner credited testimony of employees that Company supervisors questioned them on their attitude towards the Union, inquired as to the identity of Union organizers and threatened their discharge, and said that union recognition would "jeopardize the jobs of" the plant employees. These occurrences are sufficient under our decisions in Betts Baking Co. v. National Labor Relations Board, 10 Cir., 380 F.2d 199, 201-202, and National Labor Relations Board v. Midwestern Instruments, Inc., 10 Cir., 264 F.2d 829, 831, cert. denied 360 U.S. 932, to sustain the Board decision. A review of the entire record convinces us that a violation of § 8(a)(1) occurred.

10. *The Refusal to Bargain.*

After the Smoke Eaters Lodge had been certified to represent the employees in the Fire and Rescue Department, the Company unilaterally changed the terms and

conditions of employment. Although admitting the § 8(a)(5) violation, the Company pleads that the order with reference thereto should not be enforced because it is now bargaining with the employees' representative. A sufficient answer is that compliance with a Board order is no defense to a petition for the enforcement of that order.[18]

The petition for review is granted and enforcement is denied on the item relating to the discharge of Chodrick. In regard to the no-solicitation rule, the petition is granted, enforcement is denied, and the case is remanded for such further proceedings as may be appropriate in the light of this opinion. See Ford Motor Co. v. National Labor Relations Board, 305 U.S. 364, 373. In all other respects the petition for review is denied and enforcement is ordered. A formal mandate shall issue in accordance with the views herein expressed.

The Company's motion attacking the costs of printing the additional material designated by the Board is denied. The Company has failed to convince us that the material so designated is immaterial. Further, after filing the motion the Company voluntarily deposited the estimated cost of printing the appendices. The Act of July 18, 1966, 80 Stat. 308, permits the taxing of costs to the prevailing party in a civil action brought by or against the United States after the date of the Act. The petition for review was filed December 12, 1966. In the circumstances the costs are taxed 85% against the Company and 15% against the Board.

Miller, Circuit Judge, dissents.

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[18] See National Labor Relations Board v. Mexia Textile Mills, Inc., 339 U.S. 563, 567, and National Labor Relations Board v. Local 101, International Union of Operating Engineers, 10 Cir., 315 F.2d 328, 331.

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In the

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 276

SERV-AIR, INC.,
*Petitioner,*

VERSUS

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

## APPENDIX B TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

FRANK CARTER
*Attorney for Petitioner*

*of Counsel:*
OJTEN & CARTER
Bass Building
Enid, Oklahoma

July, 1968

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-0030

## APPENDIX B

[Stamped]
EXHIBIT
B

161 NLRB No. 17

D-8721
Enid, Okla.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

| | |
|---|---|
| SERV-AIR, INC. | |
| and | Cases Nos. 16-CA-2122 |
| INTERNATIONAL ASSOCIATION | 16-CA-2131 |
| OF MACHINISTS, AFL-CIO | 16-CA-2163 |
| and | 16-CA-2176 |
| SMOKE-EATERS LODGE NO. 898, | 16-CA-2187 |
| INTERNATIONAL ASSOCIATION OF | |
| MACHINISTS, AFL-CIO | |

### DECISION AND ORDER

On November 18, 1965, Trial Examiner Thomas F. Maher issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended dismissal of the complaint with respect thereto. Thereafter, the Respondent and General Counsel filed exceptions to the Decision and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

[APPENDIX]

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed except as noted below.[1] The Board has considered the Trial Examiner's Decision, the exceptions[2] and briefs, and the entire record in this case and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, as modified herein.[3]

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[1] The Trial Examiner denied as "superfluous" General Counsel's unopposed motion urging that certain minor corrections be made in the transcript. The Trial Examiner explained that he had already made these corrections himself on the basis of an earlier motion made by the General Counsel at the end of the hearing to conform the "record to the proof." A review of the record indicates that the General Counsel at the end of the hearing moved to "conform the pleadings to the proof in minor matters such as names and dates." Such a motion is routine and is made for the purpose of conforming the complaint and other formal pleadings filed by the General Counsel with the evidence adduced and recorded during the hearing. See, e.g., *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 225. It does not ordinarily purport to include a motion to correct a transcript of record which has not yet been seen, and was incorreectly construed by the Trial Examiner as permitting him to correct the transcript without any opportunity for the parties to file exceptions thereto. Alternate procedures are available in the event a trial examiner believes a record requires correction. See, e.g., *W. B. Jones Lumber Company, Inc.*, 114 NLRB 415, 421, enfd. 245 F. 2d 388 (C.A. 9). We find, therefore, contrary to the Trial Examiner, that the General Counsel's motion to correct the record was not superfluous. In the absence of opposition, the motion is hereby granted.



[2] Respondent's request for oral argument is hereby denied, as the record, including the exceptions and briefs, adequately reflect the issues and the positions of the parties.

[3] No exceptions were filed to the Trial Examiner's finding that Respondent's "segregation" of the employees who engaged in the September 2 walkout did not violate the Act.

Further, although General Counsel did not except to the Trial Examiner's dismissal of that portion of the complaint alleging that in the course of a conversation Respondent's General Manager Hood threatened employee Knowlton in violation of Section 8(a)(1), we

1. The facts reveal that, in November 1960, Respondent posted a notice stating its position on union organization. The notice stated in part that:

> (6) No person will be allowed to carry on union organizing activities on the job. Anyone who does so and who thereby neglects his own work or interferes with the work of others will be subject to discharge.

The Trial Examiner stated that since this rule applied only to on-the-job activity, it was presumptively valid, and since he found the General Counsel had not established that the rule was either discriminatorily promulgated or enforced, the Trial Examiner concluded that it did not violate the Act. Consequently, he held that Respondent's discharge of employees Haley and McCarty under this rule was not a violation of either Section 8(a)(1) or (3) of the Act. We do not agree.

The Board has held in interpreting similar notices that an employer may lawfully prevent its employees from soliciting for a union during working hours provided the ban is not promulgated or enforced for a discriminatory purpose.[4] Contrary to the Trial Examiner, we find that the record evidence amply establishes such discriminatory purpose and, therefore, that the rule in question violates Section 8(a)(1) of the Act.

At the outset, no one disputes that the notice was initially promulgated in response to union activity which apparently had begun in 1960. Thereafter, Respondent con-

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[3] (Continued)
do not adopt a possible implication in footnote 20 of the Trial Examiner's Decision that the actual presence of fear in an employee who was allegedly threatened was necessarily crucial to finding a violation. Cf., *Clark Bros. Co., Inc.*, 70 NLRB 802, 806, enfd. 163 F.2d 373 (C.A. 2).

[4] *Pepsi Cola Bottlers of Miami, Inc.*, 155 NLRB No. 50.

tinued to maintain the rule in effect, although there was no overt activity of this nature in the plant. However, in May 1964, an election was held in which the Union was certified as the bargaining representative of a unit composed of employees in Respondent's Fire and Rescue Department. In late August, certain of Respondent's supervisors engaged in interrogation of employees in violation of Section 8(a)(1). Shortly after this, on September 1, one day after Haley and McCarty engaged in the solicitations which resulted in their discharge, and undeniedly to forestall such solicitations, Respondent posted a notice reminding the employees of the provisions of paragraph 6, noted above, and calling to their attention the possible penalties for defiance of its terms. However, employee solicitations for other purposes were permitted on company time and property. Thus, Respondent's Assistant Manager, Hood, testified that he knew of such solicitations to send flowers to the widows of deceased fellow employees and similar purposes.[5] Further, although Hood asserted that the Red Cross, Community Chest, or similar charities were not allowed to solicit since many of the employees contributed to these charities by means of a voluntary payroll deduction, he admitted that when some employees decided to withdraw their deduction authorizations, they were called together to try to persuade them to reconsider.[6]

Under the circumstances here present, we find that the ban imposed by this rule was discriminatory, since it was

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[5] Apart from the Haley and McCarty discharges, Hood testified that only two other employees, who also had been engaged in conduct on behalf of the Union, had ever been disciplined for engaging in solicitation.

[6] The Trial Examiner refused to admit other evidence of such solicitations and in view of our decision in *Wm. H. Block*, 150 NLRB 341, this refusal was erroneous. However, since the record is sufficient to establish discriminatory application of the rule, we find that this exclusion was not prejudicial.

clearly promulgated in response to Union activity rather than for the legitimate purpose of maintaining order in the plant and was discriminatorily enforced in a manner directed to stifling union activity. Accordingly, we conclude, unlike the Trial Examiner, that the evidence was sufficient to establish that the discriminatory promulgation and enforcement of this rule violated Section 8(a)(1) of the Act.[7]

2. Respondent admits that Haley and McCarty were both discharged for violating the rule which we have here held to be an illegal interference with the exercise of the Section 7 rights of Respondent's employees. It is also apparent, and we conclude, that the discharges were an integral part of Respondent's illegal campaign to combat union organization and served to discourage other employees from engaging in similar activity as well as ridding Respondent of two active Union adherents.[8] Accordingly, we find that the discharge of these two employees violated Section 8(a)(1) and (3).[9] See *Ripley Manufacturing Company*, 144 NLRB 1132, 1156.

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[7] *Wm. H. Block Company*, 150 NLRB 341; *Ward Manufacturing, Inc.*, 152 NLRB No. 127; *Walton Manufacturing Company*, 126 NLRB 697, enfd. 289 F. 2d 697 (C.A. 5).

[8] We note from the record that the Respondent summarily discharged Haley although he could not have "interfere/d/ with the work of others" since the employees he solicited were not actually working. We note also that the record does not support the Respondent's claim that McCarty either neglected his own work or interfered with the work of others when he solicited for the Union.

[9] As we have found that Haley and McCarty were unlawfully discharged, we also find, contrary to the Trial Examiner's statement in part C(4) of his Decision, that the first walkout of the JEFM employees in protest of their discharges was an unfair labor practice strike. However, this contrary conclusion does not affect the correctness of the Trial Examiner's ultimate conclusions or the remedy herein insofar as these strikers are concerned.

[APPENDIX]

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its order the Recommended Order of the Trial Examiner, as modified below, and orders that the Respondent, Serv-Air, Inc., Enid, Oklahoma, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified:

1. Paragraph 1 of the Trial Examiner's Recommended Order is amended by adding the following as paragraphs (i) and (j):

"(i) Discouraging membership in International Association of Machinists, AFL-CIO, Smoke-Eaters Lodge No. 898, International Association of Machinists, AFL-CIO, or any other labor organization, by discharging or otherwise discriminating in respect to the hire or tenure of any employee under color of enforcing a rule against solicitation promulgated for a discriminatory purpose or applied in a discriminatory manner or on any other pretext."

"(j) Threatening employees with discharge, layoff, or other reprisal for exercising their rights under Section 7 of the Act under color of a rule invoked or applied for the purpose of restraining or coercing employees in the legitimate exercise of those rights."

2. Reletter the present paragraph 2(e) of the Trial Examiner's Recommended Order to 2(g) and add the following as paragraphs 2(e) and 2(f):

"(e) Offer immediate and full reinstatement, if this has not already been done, to employees Alfred R. McCarty and Joe D. Haley, to their former or substantially equivalent positions with backpay and with interest added thereto in the usual manner, as referred to in the section of the Trial Examiner's Decision entitled 'The Remedy'."

"(f) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records relevant and necessary to the determination of the backpay due and to the reinstatement and related rights provided under the terms of the Recommended Order."

3. Add to the list of employees named in the final paragraph of page i of the Appendix, the names of Alfred R. McCarty and Joe D. Haley.

4. Add to the Appendix, after the third paragraph, the following two paragraphs:

WE WILL NOT discourage membership in INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, SMOKE-EATERS LODGE NO. 898, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, or any other labor organization by discharging or otherwise discriminating in respect to the hire or tenure of any employee under color of enforcing a rule against solicitation promulgated for a discriminatory purpose or applied in a discriminatory manner or on any other pretext.

WE WILL NOT threaten employees with discharge, layoff, or reprisal for exercising their rights under Section 7 of the Act under color of a rule invoked or applied for the purpose of restraining or coercing employees in the legitimate exercise of those rights.

Dated, Washington, D. C. [Stamped] Oct. 25 1966

Frank W. McCulloch, Chairman

John H. Fanning, Member

Gerald A. Brown, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[APPENDIX]

Enid, Okla.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

| | |
|---|---|
| SERV-AIR, INC. | |
| and | Case No. 16-CA-2122 |
| INTERNATIONAL ASSOCIATION | 16-CA-2131 |
| OF MACHINISTS, AFL-CIO | 16-CA-2163 |
| and | 16-CA-2176 |
| SMOKE-EATERS LODGE No. 898, | 16-CA-2187 |
| INTERNATIONAL ASSOCIATION OF | |
| MACHINISTS, AFL-CIO | |

*Norman W. Eckhardt, Esq.* and *Charles W. Toomey, Esq.*, of Fort Worth, Tex. for the General Counsel.

*Otjen, Carter, Huddleston and Otjen*, by *Frank Carter, Esq.* and *Charles Huddleston, Esq.*, of Enid, Okla., for the Respondent.

*Mr. V. M. Cameron*, of Fort Worth, Tex., *Mr. James W. Witcher*, of Oklahoma City, Okla., and *Mr. Harvey Christian* of Chickasha, Okla., for the charging Parties.

Before: *Thomas F. Maher*, Trial Examiner.

## TRIAL EXAMINER'S DECISION

### Statement of the Case

Upon charges and amendments thereto filed between September 4 and December 2, 1964, by International Association of Machinists, AFL-CIO, and in some instances by

its Smoke-Eaters Lodge, No. 898, both referred to herein as the Union, the Regional Director for the Sixteenth Region of the National Labor Relations Board, herein called the Board, issued a consolidated complaint on behalf of the General Counsel of the Board against Serv-Air, Inc., Respondent herein, alleging violations of Section 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended. (29 U.S.C., Sec. 151, *et seq.*), herein called the Act. Respondent, in its duly filed answer, while admitting certain of the allegations in the complaint, denied the commission of any unfair labor practice. However, during the course of the hearing certain amendments to the complaint and answer were made, and in several such instances to be considered herein (*infra,* p. 46) the substance of certain of Respondent's amended answer did constitute, in effect, an admission of a violation of the Act.

TXD-579-65

Pursuant to notice the aforementioned hearing was held before me in Enid, Oklahoma, between January 12 and 15 and on April 7 and 8, 1965. All parties were present, represented by counsel or representatives as indicated above, and afforded a full opportunity to be heard, to present oral argument and to file briefs with me. Briefs were filed by General Counsel and the Respondent. Thereafter Counsel for the General Counsel filed a motion with me requesting in considerable minor detail the correction of the transcript of the hearing. No objection has since been interposed. Counsel, however, had already moved, prior to the closing of the hearing, and without objection, for the conformance of the record to the proof in minor details which I granted, deeming it to refer to spelling and typographical errors and omissions. As Counsel's subsequent motion merely catalogues in detail such misspellings and obvious typographical errors and omissions, and as this matter was already disposed of by motion at the hearing and by my physical cor-

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[PRINTER'S NOTE: The *infra* and *supra* page references throughout this document have been changed to conform to the printed pages hereof.]

rection of the transcript where such discrepancies appeared, I deny Counsel's motion as being superfluous.

Upon consideration of the entire record, including the briefs of the parties, and upon my observation of each witness while testifying and in the hearing room,[1] I make the following:

## Findings of Fact and Conclusions of Law

### I. The business of the Respondent

Serv-Air, Inc., Respondent herein, is a North Carolina corporation engaged in operations at Vance Air Force Base, Enid, Oklahoma, under a contract valued at approximately $5,000,000 with the U. S. Air Force, by virtue of which it performs base services which have a substantial impact upon National Defense. Upon these stipulated facts I conclude and find Respondent to be an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.[2]

### II. The labor organization involved

It is agreed between the parties and I accordingly conclude and find that International Association of Machinists, AFL-CIO, and its Smoke-Eaters Lodge No. 898, are labor organizations within the meaning of the Act.

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[1] Unless specifically indicated to the contrary, any credibility evaluation I make of the testimony of any witness appearing before me is based, at least in part, upon his demeanor as I observed it at the hearing and particularly at the time the testimony was given. Cf. *Retail Clerks International Association, AFL-CIO, Local 219,* 134 NLRB 1680, 1682 and fn. 3; *Bryan Bros. Packing Co.,* 129 NLRB 285. To the extent that I do not rely upon or I reject in part or entirely the testimony of any given witness, it is my intent thereby to indicate that such part or whole of the testimony, as the case may be, is discredited by me. *Jackson Maintenance Corporation,* 126 NLRB 115, 117, fn. 1, enfd. 283 F. 2d 569 (C.A. 2). To the extent that I credit any witness only in part I do so upon the evidentiary rule that it is not uncommon "to believe some and not all" of a witness' testimony. *N.L.R.B.* v. *Universal Camera Corp.,* 179 F. 2d 749, 754 (C.A. 2)

[2] *Gray, Rogers, Graham and Osborne,* 129 NLRB 450.

## III. The issues

1. Respondent's admitted refusal to bargain in violation of Section 8(a)(5).

2. The legality of posted notice provisions, including a no-solicitation rule.

3. The discharges of Employees Haley and McCarthy for cause.

4. The segregation of returned strikers as a safeguard against anticipated future strike action.

5. The conditional and unconditional character of offers to return to work.

6. The illegal motivation of an employer lockout.

7. The distinctions between a lockout and a continuing strike.

8. Unlawful restrictions upon the wearing of union insignia.

9. The unlawful character of an employee election petition.

10. The discriminatory implementation of an economic reduction in force.

## IV. The unfair labor practices

### A. *Introduction*

Vance Air Force Base, hereafter referred to as Vance, is one of eight bases of the Air Force Training Command devoted to the training of pilots for the United States Air Force Attached to Vance, itself a 2500 acre facility, are Kegelman Field and Perry Field, two auxiliary fields in the Enid, Oklahoma, area whose operations are fully integrated with those of the main base. The installation at Perry Field was deactivated in December 1964, an event of considerable moment to the parties to this proceeding.

[APPENDIX]

Respondent's function at Vance was described by its President Truman Miller as one of responsibility for the operation and maintenance of the base in support of its flight training mission, a function which does not appear to be assigned to a civilian organization at any of the other Training Command bases. Thus Respondent is responsible for the maintenance of all the facilities and equipment used in the pilot training program, including the servicing of aircraft, utilities and base installations, the handling of supplies, and the safeguarding of equipment and personnel. To this end approximately 1100 civilians are employed by Respondent; approximately 600 of these are employed in the Division of Aircraft Maintenance and 80 in the Fire and Rescue Department, both organizations being the ones principally involved here. In the Aircraft Maintenance Division of which John Hill is director, there are seven major units: the base shops, periodic inspection, pipeline, jet engine field maintenance (JEFM), unscheduled maintenance, quality control, and maintenance control. The Fire and Rescue Department, as its title suggests, is equipped to fight the usual variety of building conflagrations, but its more specific functions deal with the protection of aircraft and personnel on the field and flight line, and in the hangars, and to provide the necessary rescue facilities.

By way of further description of the training operations at Vance it appears that in addition to the 1100 employed by Respondent that the military complement at the time of the hearing was in the neighborhood of 600; 400 being pilots in the various stages of training and the remaining 200 being instructors and staff and command cadre. The training program extends over a fifty-five week period and is so organized that eight classes are in progress, with one class graduating as another commences, at an approximate six-week interval. Except insofar as military replacements were used on the occasion of one walkout the military personnel at Vance has no connection whatever with any of the incidents described herein.

Throughout the hearing the character and quality of aircraft maintenance was continually emphasized. Thus the type of plane in the training service at Vance was described as a fighter plane of the T-38 variety—a highly developed jet aircraft capable of attaining supersonic speeds and powered by a jet engine—the G. E. J-85, whose advanced improvements required a high degree of attention and maintenance not lightly to be compared with the garden variety of combustion engines, or indeed with jet engines of an earlier vintage. Accordingly, the standards maintained by Respondent in its performance of services were shown to be of the high degree required in the treatment of precision machinery, and at all times were intended to conform to standards established and continually revised upward by the Air Force, as promulgated in the various manuals to which Respondent and its employees were required strictly to adhere.

Significant to the issues presented by this case are several rules or policies derived from or directly related to Air Force requirements and standards. These pertained to (1) the elimination of foreign object damage, (2) the interval of periodic inspection of jet engines, (3) the protection of employees from diversionary activities, and (4) the maintenance of crew integrity.

*The foreign object damage* referred to hereafter is the resulting havoc caused by the introduction of small objects into the working mechanism of jet engines. It is well established that even the smallest screw or washer, not to mention screwdrivers or metal names plates, could effectively demolish a jet engine, and if such occurred in flight the consequences to aircraft and pilot would be obvious. A continuing program to minimize this hazard has always been high on the Air Force's priority of safety precaution and is significantly relevant to a program of badge display carried out by the employees and discussed in detail hereafter (*infra*, pp. 42 and 77).

[APPENDIX]

*Periodic inspection* of jet engines is one of the basic phases of the aircraft maintenance program. Depending upon the type of engine involved a specific time interval is established after which the required inspection is performed by the employees assigned to the Periodic Inspection Shop. In early 1964 the interval for the periodic inspection of the J-85 engine in service at Vance was 100 hours. Thereafter, for technical reasons adopted by the Air Force and set forth in appropriate directives to individuals and units concerned, the interval was raised from 100 hours to 200 hours, thus permitting the J-85 engine to remain in service twice as long between inspections.

*The protection of employees from diversionary activities* was a responsibility imposed by the Training Command to maintain effective workmanship among the maintenance mechanics without undue distraction from their work. In this respect, as will be detailed hereafter, Respondent promulgated by notice a rule restricting solicitation of employees by others. Portions of this rule and its enforcement has been alleged to constitute an unfair labor practice.

*The maintenance of crew integrity* was a management policy approved by the Air Force to insure that an engine be worked on by an established crew rather than a fluctuating group of individual mechanics. Inherent in this policy was the goal of more effective maintenance and inspection, to the principal benefit of those who would fly the plane. Consistent with this concept of crew integrity, employees were reassigned and allegedly segregated into new crews, an operation alleged to have been instituted for discriminatory purposes and to be considered in detail hereafter (*infra*, pp. 29-30).[3]

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[3] The foregoing is a synthesis of the testimony of Col. James Little, Major Eugene Bartolich, Major John Troubaugh, and President Truman Miller whom I have credited generally, and of Assistant General Manager John Hood and Director of Aircraft Maintenance John Hill, both of whose special competence in the area being considered warrants reliance upon their testimony.

B. *Sequence of events*

1. Union activity and representation

As early as November 1960 union activity among the Respondent's employees was manifest by a conspicuously posted notice relating to its employees' union activities. Since then and to the time of the hearing it is stipulated that the following notice appeared on all company bulletin boards at or near the timeclocks at Vance, Kegelman and Perry Fields:

TO ALL EMPLOYEES

Since the Union is again putting on a campaign to get in here, some of you have been asking questions in regard to the following matters. We have decided to state the Company's position on these subjects as clearly as we can for everybody alike:

(1) *This matter is, of course, one of concern to the Company. It is, however, also a matter of serious concern to you and our sincere belief is that if this Union were to come into this Plant, it would not work to your benefit but to your serious harm.*

(2) *It is our positive intention to oppose this Union and by every proper means to prevent it from getting in here.*

(3) *We would like to make it clear that it is not necessary, and it is not ever going to be necessary, for anybody to belong to any Union in order to work in this Plant.*

(4) *Those who might join or belong to this Union are not going to get any advantages or any preferred treatment of any sort over those who do not join or belong to any Union.*

(5) *If anybody causes you any trouble at your work or puts you under any sort of pressure to join*

*the Union, you should let the Company know, and we will undertake to see that this is stopped.*

(6) *No person will be allowed to carry on Union organizing activities on the job. Anybody who does so and who thereby neglects his own work or interferes with the work of others will be subject to discharge.*

Anybody who tells you anything contrary to any of the foregoing is not telling you the truth.

TRUMAN W. MILLER
President & General Manager
SERV-AIR, INC.
Vance Air Force Base, Oklahoma

From the union activity thus alluded to there emerged a campaign resulting in an election among the employees in the Fire and Rescue Department conducted by the Board in Case No. 16-RC-3593 on May 6, 1964, in which the Union obtained a majority of the votes and was thereafter certified as bargaining representative of a unit described as:

> All employees of Respondent in the Fire and Rescue Department of the Base Operations and Maintenance Division, Enid, Okla., excluding office clerical employees, fire chief, platoon chiefs, guards, watchmen and supervisors as defined in the Act.

The number of employees in this unit was reliably established to be 85 and Respondent concedes the Union's representative status.

2. First evidences of active company opposition

Previously, on February 19, 1964, a hearing in this representation proceeding had been held and Employee R. A. Chodrick was the only one appearing in behalf of the Union. Thereafter on May 6, immediately following the Union's victory in the election Chodrick, in the company

of Union Representative James Witcher and Employee Dodd stopped off at Perry Field, as they drove from Vance to Ponca City, and visited with the employees at Perry, discussing with them the election results. This conversation took place in the office trailer at the field during duty hours while the employees there were drinking their coffee. As the conversation was concluding and Chodrick, Witcher and fellow riders were about to continue on their journey Personnel Supervisor Masemore appeared on the scene. While there is no testimony as to any conversation that transpired it was stipulated that as a result of the episode Chodrick was presented on May 7 with a warning letter which he refused to countersign.[4] The letter was signed by Supervisor Willis B. Moxley and authorized by Director of Base Operations Cumpston and stated that Chodrick had been warned as follows:

> In that Ressie A. Chodrick and Myron W. Dodd were engaging in Union activities on Plant premises at Perry Auxiliary Base during working hours on or about 1400 hours, 6 May 1964, in violation of Company Regulations prohibiting Union activity on Plant premises during working hours. Any further violations of Company policy by you may result in your termination.

3. Unilateral Company decisions and actions

Prior to May 9 it had been company policy with respect to the fire-fighting employees whom the Union then represented to permit them to take a night off after having completed 13½ hours of work, and to permit one of its three fire-fighting crews to take Saturday and Sunday off at three-week intervals. On May 9, three days after the

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[4] The foregoing is a summary of the undenied testimony of Chodrick which I accept as explanatory of the stipulated warning letter. Upon my observation of him as a witness I am not impressed with Chodrick as a reliable witness and accordingly, with the exception of his undenied account, reject his testimony unless it is corroborated by the testimony of credible witnesses.

employees had chosen the Union as their bargaining representative, Respondent admittedly discontinued this practice without prior consultation with the Union. Thereafter on May 12, and continuing for a period of about three or four weeks, Respondent, likewise without prior consultation with the Union, admittedly changed the night watch assignments of employees in the bargaining unit from four men standing night watch for two hour periods, respectively, to one man standing an eight hour night watch period; and on May 15 and 21, again without prior consultation with or notice to the Union, Respondent changed the existing lunch hours of fire-fighting employees at Kegelman and Perry Fields.[5]

### 4. The questions of employees and disparagement of the Union and its members

Elsewhere at the base Respondent's interest in the Union became apparent as the Union began to extend its field of operations beyond the certified fire-fighting unit. Thus when Employee Victor Lankard was interviewed for employment in the base shops on June 29, 1964, J. C. Masemore, Respondent's Supervisor of Personnel, asked him his stand on the Union.[6] Subsequently, in late August, Shop Superintendent Houston Sprayberry admittedly pursued the same course, calling various employees into his office between August 25 and 27 and asking them how they felt about the Union and about the organizing drive that was going on in the shop. Among those called was Employee

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[5] The foregoing incidents occurring between May 9 and 21 are found upon the basis of a stipulation between the parties made at the hearing as a consequence of which I granted a motion for judgment on that particular portion of the pleadings alleging a violation of Section 8(a)(5) of the Act, to which Respondent acquiesced, agreeing to be bound by the remedial order which I recommended and which I repeat herein, and not to file exceptions thereto with the Board. See *infra*, p. 45.

[6] The cerdited testimony of Lankard, Masemore had no recollection of the incident.

Billy Ming who credibly testified that Sprayberry, in his office on August 26, said he wanted to obtain his opinion about the Union. When Ming answered favoring the Union Sprayberry mentioned that "he had been through this sort of thing before," and that he did not think anyone would benefit from a union. He then commented on the leaders of the organizing drive as "some of the sorriest people," mentioning Employees Scaia, Knowlton, Mundy, and Edwards, and saying that "regardless of whether a union came in he was getting rid of those men." (Tr. 44). Sprayberry concluded his conversation with Ming by asking if he knew any of the other union organizers, and specifically, how Employee John Kuberskey felt about the Union.

Others to whom Sprayberry spoke during this period were Employee Thomas Willson whom he asked what he thought of the Union and how he was going to vote; and Employee Kenneth Edwards who was asked the same questions. In the course of this latter conversation, as Edwards was expressing his personal approval of the Union, Sprayberry accused him of thinking only of himself and of personal gain and being willing thereby to "jeopardize the jobs of 1100 men and their families." Thereafter on September 10 Sprayberry had a conversation at his home with Employee Talbert Gooday who had visited him seeking a leave of absence. In the course of the conversation Sprayberry asked him what he thought about the Union and upon learning that Gooday favored it, said "that it would jeopardize their jobs out there" (Tr. 530). Sprayberry, in defense of his conduct, testified that he never threatened employees during these conversations. I reject his interpretation of the remarks attributed to him and, to the extent that he denies the remaks themselves I do not credit him.[7]

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[7] Upon my observation of Sprayberry at the hearing and as a witness I am not persuaded of his reliability as a witness. I accordingly do not credit his testimony except insofar as it is corroborated by credible witnesses or constitutes admissions contrary to his own or Respondent's interests.

The record also contains the credited testimony of Employee Russell DeHart to the effect that Morris Shackley, a leadman in the Hydraulic Department, told a group of employees on September 2 that if they did not get rid of their union badges they would lose their jobs. Because the supervisory status of Shackley was not resolved in the record to my satisfaction I shall refrain from including this incident among the findings which support the allegation of theatening employees.

5. The Union's major organizing drive

As the foregoing incidents were occurring Respondent and the Union joined issue on the subject of Union membership solicitation and the following letter dated September 1, 1964, was sent to Union Representative Witcher and copies prominently posted on company bulletin boards:

. . . . . .

> You raised the question of solicitation on the premises. In order that there may be no misunderstanding as to company policy, we refer you to our printed Rules and Regulations relating to organizing activities which have been posted prominently on the Bulletin Boards with a large, red border, since 1962. The first sentence of Paragraph No. 6 of this Bulletin read, as follows:
>
> > "No person will be allowed to carry on union organizing activities on the job."
>
> This means that:
>
> 1. There will be no solicitation by any employee during working hours, on the premises.
>
> 2. No person, who is not an employee of Serv-Air, Inc. will be permitted to solicit on the premises.
>
> 3. As a necessary factor in maintaining order, production, discipline, and the efficiency required of us

at Vance Air Force Base, there will be no papers, cards, or literature of any kind distributed during work time, or left in working areas of the premises.

The responsibility is yours for any misguidance you give to any of our employees which results in disciplinary action or possible termination.

Sincerely yours,

/s/ Truman W. Miller
TRUMAN W. MILLER
President-General Manager

By late August the tempo of the Union's organizing campaign had increased substantially. Meetings were being held, memberships solicited, and organizers were recruited from among the ranks of employees and issued steward's badges which they wore prominently about the shop. These organizers, it appears, circulated throughout the base in roving bands, seeking new members. Thus Employee Knowlton testified that he personally attempted to get 150 to 200 employees to join, that he "was always soliciting in the engine shop," and that on August 31 a group of twelve employees from the engine shop, went to Hangar 141, another shop, to solicit union cards. Included in this group was Employee Alfred R. McCarty, whose activities together with those of Employee Joe D. Haley, were the stimulation for what transpired thereafter.

a. *The McCarty discharge*

McCarty, by his own admission, had entered the hangar with the group for the express purpose of signing up new members. Excerpts from his testimony best describes what occurred:

> We entered the hangar on the north side and walked through the hangar up to the break room and there were several people there eating lunch, playing games.

They were all in a group and I walked up to one group of people that were sitting at a table—a group of four—eating lunch, and I asked one person there in particular if he was in the Union and he said, "No" and I asked him if he was interested in the Union and he said he was not interested. So I in turn moved to another table, there was a group of people playing dominoes. I asked a gentleman there at the table if he was in the Union and he said, "No" and I said, "Would you mind joining the Union and signing a card," and he told me to get the hell out of there . . .

* * *

Q. What happened immediately next?

A. Well, our group started out of the break room into the hangar. We started across the hangar and I noticed an employee sitting on one of those little roll type seats under the nosegear of an aircraft . . .

Q. What was he doing?

A. He was eating a sandwich.

* * *

A. I walked up to him and asked him if he was in the Union and he said he was not and I said, "Would you be interested in signing a card and joining our Union?"

* * *

Q. How long did this conversation last, approximately?

A. The conversation lasted less than two minutes. Well, he said he was not interested in the Union and he made a brief statement about that he was forced to join a Union for a—some kind of a music-musician Union and he would have to think it over. So, I did not have time to fool with him and I said, "Well, think it over and come see

one of us." And the people I was with, we turned and walked on. I looked up and there was a man in the canopy of this airplane and I did not say a word to him because he was busy.

Q. What did you do next?

A. He went across the Hangar and there was a roll type work bench or desk there. There was a man there at the desk. While I believe he was busy at something, but I do not recall.

Q. What did you say, if anything

A. I asked him if he was working and he said he was working and I made a remark to him that we were not allowed to solicit on Company time, I thanked him and went on around the end of the airplane.

There was a fellow leaning up against the wing of an airplane and I asked him if he was working and he said, "I am just getting ready to start to work," so I began to give him my punch line, "Are you a member of the Union" and he said, "No" and I said, "Would you be interested in joining our Union?" and he was undetermined so I handed him a Union card and told him to take it home and think it over and if he was interested to bring it back to anyone of the committee men and hand it to him.

TRIAL EXAMINER: Then what happened?

THE WITNESSS Well the group broke up and went on their merry way and I went to lunch.

Upon cross-examination McCarty supplied further information, thus:

Q. These one hundred and fifty people that you talked to and solicited between the 20th of August and the 2nd of September; did you do that all during the lunch hour?

A. Some of the people I talked to was not on government property and some were on government property.

Q. Did you do any of that on the job?

A. No, sir.

Q. Until this deal on August 31?

A. I never solicited any business on Company time.

Q. Well now, you did on August 31 solicit some people while they were working on the job, did you not?

A. I was on my lunch hour and I did not know they had a shift down there at that time.

Q. You saw these men working on a shift, did you not?

A. The ones I talked to were eating, playing dominoes or sitting on their butts.

* * *

Q. Well, did you ever persist in any way in talking to them after they had told you that they were working and did not want to be bothered?

A. Normally I would cease the conversation and thank them and go on about my business.

Q. I am asking you what you did that morning?

A. To the best of my knowledge, the people that I noticed that were working I left alone. The people that were not working I walked up to them and talked to them. They could have been on working time when I talked to them, but were not working when I talked to them.

(TR. 580-593.)

Upon learning of McCarty's activities from reports submitted by several of the employees[8] Respondent's Director of Aircraft Maintenance, John Hill, after consultation with other management officials, sent for McCarty on September 2 and confronted him with the reported details of his activities. McCarty admitted to this conduct, whereupon Hill advised him that his employment was being terminated for "union activities during working hours" which Respondent has at all times claimed to have been in violation of the no-solicitation rule contained in Paragraph 6 of the notice posted in the plant.[9]

b. *The Haley discharge*

During the same period Employee Joe Haley was engaged in soliciting activities similar to McCarty's, with identical consequences. On August 31, after reporting to work at his usual 7:15 a.m. starting time Haley was directed to go to the flight line at the north end of the field and "pull daily preflight inspections in place of another person." After engaging in these duties until "about 8:30" Haley went into one of the nearby "line shacks to smoke

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[8] Employees Gerald Parker and Louis Durheim, called as witnesses by Respondent, credibly testified in substantial corroboration of McCarty's account of his membership soliciting, stating in detail the names and circumstances of his solicitation; and a statement to the same general effect in the handwriting of Employee Richard A. House is also in evidence. While there is considerable variation of emphasis in the testimony of these men in their assessment of McCarty's union activity and although it is clear that Respondent had solicited their reports of the incident from each of them, nevertheless the testimony supports in essential detail McCarty's hesitant and guarded admission that employees were either at work, about to work, or resting from work while he solicited their union membership.

[9] *Supra*, p. 6. Paragraph 6 reads as follows:

> No person will be allowed to carry on Union organizing activities on the job. Anybody who does so and who thereby neglects his work or interferes with the work [of] others will be subject to discharge.

a cigarette and check the time," his break time being from 9:15 to 9:30 a.m. Upon entering the shack he met a fellow employee, William Weaver, who inquired about the steward's badge Haley was wearing. Haley explained that it authorized him "to organize for the union." Haley continued

> Then I asked him if he would like to join and he said, "No," so I put my organizer's card in my pocket and started to leave and I looked at the clock and I said, "Well, it is break time and I am ready to go on and leave."
>
> Q. Excuse me, what time did you think the clock said?
>
> A. Nine o'clock.
>
> Q. All right. What happened immediately after this?
>
> A. He assured me that it was only 8:30 that I had looked at a twenty-four hour clock and I had misread the clock.
>
> Q. Was it, in fact, 8:30, at that moment?
>
> A. After recognizing it, yes, it was 8:30.
>
> Q. All right.
>
> A. So I turned to leave and he said, "Say let me see one of those cards." He said, "Say I might want to join the union." Again I took one out of my pocket which was still folded, he took it out of my hand unfolded it and read it, looked at it, then held it up in the air so Mr. Thurman could read it and he says, "Hey Red, would you like to join the Union?" And Red turned around and says no, he says that
>
> * * *
>
> A. Then I returned—then Red Thurman left and William Weaver returned the card to me and I put it in my pocket and then I left.

Q. Was either Thurman or Weaver working at any time during the conversation with these gentlemen.

A. No sir.

(Tr. 554-556)

* * *

Q. Now Joe, this trip that you made to the line shack was that a customary duty that you had?

A. Yes, sir.

(Tr. 56.)

Subsequently, upon cross-examination at the hearing Haley admitted that he had signed a statement for the Compensation Board as follows, "I was discharged from my last Employer, Serv-Air Inc., on September 2, 1964, for trying to solicit Union members while on the job at Serv-Air."

Leadman E. J. Thurman, called as a witness by Respondent, corroborates Haley's admissions. As Haley himself testified to soliciting during his normal working hours I find it unnecessary to rely upon Thurman's further testimony which elaborates upon the details of Haley's solicitation although much of it is at variance with Haley's account. The written complaint of Weaver as well as Thurman's written report submitted immediatey after the incident also appear in the record. Weaver is no longer employed by Respondent. As in the case of Thurman, noted above, I find it unnecessary to resolve the issue of credibility created by Weaver's written statement as to *other* solicitation appeals which Haley has denied. Suffice it to say the incident found above admittedly occurred while Haley was at work which is Respondent's stated reason of discharging him.[10]

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[10] I do not find it necessary to consider nor do I base my findings upon further evidence, supplied by Hill and Thurman that other employees and supervisors were solicited by Employees Hill and McCarty.

Immediately after disposing of McCarty on September 2, Hill then sent for Haley and confronted him with the complaints of employees that he had solicited their union membership on company time. Hill thereupon informed Haley that upon the basis of the information it had Respondent was terminating him for "union activity during working hours" in violation of the posted notice.[11]

6. The September 2 protest walkout

Immediately upon learning of Haley's and McCarty's discharge on September 2, fifteen employees working in another shop on the base, the JEFM shop, immediately walked off the job and proceeded to Sprayberry's office to protest. In Sprayberry's absence they spoke to his assistant, Eugene Lolmaugh, to whom they protested the discharges as being for union activity and requested that the two men be returned to their jobs. When Lolmaugh informed the employees that the decision was final all fifteen punched out their timecards;[12] this action being in conformance with a prearranged decision made at an August 20 union meeting, to walk out if anyone were fired for Union activity.[13] The striking employees immediately assembled at a nearby motel and held a meeting attended by Kelsey Hawkins, president of Smoke-Eaters Lodge Local 898 which represented another unit of the employees, the firemen, and Harvey Christian, the Union's Special Rep-

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[11] Haley testified that he was aware of the notice upon which Respondent based his discharge.

[12] The credited testimony of employees Victor Lankard and Robert Knowlton.

The following employees in the JEFM shop walked out:

| | | |
|---|---|---|
| Thomas E. Anson | G. F. Gooch | Billy D. Ming |
| Franklin Brockway | Robert J. Kuhlmeier | Donald C. Peckham |
| Larson L. Brown | Robert Knowlton | Jesse C. Payne |
| Kenneth W. Edwards | John W. Kuberskey | Van R. Ringgold |
| Eldon G. Greer | Victor H. Lankard | Thomas D. Scaia |

[13] The testimony of Knowlton.

resentative. With no indication that circumstances had changed in the short period between their walkout and the meeting the employees voted to return to work on the following day, September 3. This they did, presenting themselves at the shop at 7:15 a.m.

7. The reassignment of work stations

Upon their arrival in the JEFM shop the returning strikers were directed by Sprayberry and Foreman Don Klepfer to work at different work stations or areas from those in which they had previously been assigned.

It is important at this point to the determination of the issues raised to understand the nature of the JEFM shop where jet engine maintenance and inspections are performed. By the nature of the work each engine is handled by a separate work crew of four or five mechanics working in designated docks or work areas. These areas, each usually 300 square feet in area, are located in blocks of four throughout the plant, with cross aisles adjacent to each area in the block. In the interest of efficiency and safety it is company policy, approved by the Air Force, that crew integrity, that is, assigned membership in a designated crew, be maintained (*supra*, pp. 15-16).

The returning strikers had been members of eight distinct crews prior to their September 2 walkout, excepting only Kuberskey and Ming, assigned to the Gear Box Room, and Gooch to the Cleaning Room. After the men had walked out Respondent reassigned the crews to bring each one up to full numerical strength. Accordingly when the strikers returned 11 of them were constituted as three new and separate crews, Lankard was returned to the crew he had left, and Kuberskey, Ming and Gooch to the work to which they had been previously assigned. Sprayberry told the men at the time and Hill credibly explained in his testimony that this realignment of the crews was essential to insure that the adjustments made in the crews after the

men had walked out on the previous day would not be impaired, to the detriment of the work being performed on the jet engines. Hill also credibly explained at the hearing

> It was our intention in this to put the people that were building an engine together, and if we had to we could set one engine off if this crew walked off and then when they came back they could have their same engine.
>
> (Tr. 920)

In a word, the readjustment was intended to make certain that the people most likely to walk off in the future would be members of the same crews, thus lightening the effect upon the over-all production of the shop.

8. The September 3 protest walkout

Within an hour of their return to work on September 3 under the reassigned conditions the employees involved protested their relocation to Sprayberry, branding Respondent's action as one of isolation and segregation in reprisal for their strike action. When Sprayberry refused their demand to revise the work assignments to eliminate this alleged indignity the men had a brief conference and walked off again, punching out their timecards.[14] In addition to the 15 employees who had walked out on September 2 and again on September 3, as just described, 11 more employees joined in the protest and walked out, making a total of 26.[15]

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[14] The credited testimony of Knowlton and Hill, corroborating in substantial part Sprayberry's description of the incident.

[15] The additional strikers were

| | | |
|---|---|---|
| Willard R. Bebee | William L. Franklin | K. C. Muir |
| John J. Blankenship | George W. Jones | Phillip O'Daniels |
| Richard D. Canaday | Darl W. Long | Richard W. Spoonhoward |
| Dewey Dale Eeds | Earnest E. McCalvin | |

All except Jones, Franklin and Muir were from the JEFM shop. None of these additional strikers from JEFM shop had been grouped

### 9. The unsuccessful effort to to return to work

On the evening of their second walkout, September 3, the 26 employees met and agreed to return to work on the following morning, September 4. When they did so at 7:15 a.m. of the 4th they found all of their timecards out of the rack and upon inquiry they were directed by Sprayberry to report to Director of Maintenance Hill's office. Hill asked the men if they were willing to resume work under the new crew arrangements and Employee Van Ringgold, speaking for the men, replied, "We will give you till 7:45 Tuesday to put us back where we were before." Whereupon Hill, referring to notes which he held, stated, "Well, since you have walked out, I have had to rearrange my work schedule and we do not need you today." Hill credibly testified concerning this incident in substantial corroboration of Employee Knowlton, upon whose testimony this account is based.[16] By way of explanation Hill further testified that he considered the men's ultimatum of returning to the original positions by the following Tuesday to be a condition under which they would return immediately and he accordingly refused to permit them to resume work. The men again walked out.

### 10. The base shop walkout

As news of what occurred circulated among the employees a number of those working at the other end of the base—at the base shops—joined in the walkout in protest of what they considered to be a lockout on that morning of

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[15] (Continued)

in the so-called segregated areas, although four of them, *and many other employees in the shop*, had been reassigned to other positions as part of Respondent's accommodation move after the first walkout, September 2.

[16] Hill identified Payne as the men's spokesman, whereas Knowlton testified that Ringgold stepped from behind Payne and spoke up. I do not deem this variant to be of significance.

the original 26 strikers.[17] According to Hill this walkout caused a chain reaction in other shops throughout the base and other employees, not specifically identified, joined the strike.

11. The September 4 offer to return

On the evening of Friday, September 4, the three protesting groups of employees, namely the original 15 from the JEFM shop, the 11 who joined them, and the base shop employees, met with Union Representative Christian and authorized him to make an unconditional offer in their behalf to the Company to return to work on September 8, the next working day following the coming holiday week-end. Christian's offer in behalf of the employees took the form of a telegram to the Company dated September 4 which first recited that the employees walked off because of specified unfair labor practices and concluded:

> The Union is respectfully demanding that the Company cease and desist these unfair practices and to allow all

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[17] The credited testimony of Knowlton corroborated by Director Hill. I do not accept Employee Woodbury's testimony to the effect that the base shop group of which he was the leader walked out in protest of the Haley-McCarty discharges which had occurred two days earlier (*supra*). In the first place it contradicts the corroborated testimony of Hill with whom the base shop employees registered their protest of the alleged JEFM segregation and lockout. Secondly, Woodbury testified to having witnessed McCarty's discharge. Having done so and having waited until after the alleged lockout of protesting strikers had occurred, it seems more reasonable to conclude that it was the lockout and not the earlier discharges which prompted the base shop walkout.

The following walked out on September 4, joining the other 26:

| | | |
|---|---|---|
| Ronald Ayoder | Lloyd A. Glover | Robert Summers |
| Don Alcorn | Kenneth Critz | Doyle L. Stone |
| John W. Bly | Bill Medina | Wallace St. Clair |
| Jack Brazzel | Bobby Meador | Gary Struble |
| Elmer L. Brown | Robert D. Neely | Marvin L. Turner |
| Bobby G. Clark | James Pruner | Patrick T. Van Leer |
| Russell L. Dehart | Billy W. Ramsey | William F. Wilkerson |
| Luke L. Draffin | Edward J. Rollo | Walter Wazal |
| Teddy Edwards | Olen Smith | Roy D. Woodbury |
| | | Thomas Roberson |

concerned to return to their jobs without any more retaliatory measures being taken against them because of their concerted action.

An immediate reply as to the Company's intent is requested.

### 12. The September 8 base shop lockout and JEFM shop walkout

On the morning of September 8, all of the employees previously on strike, both JEFM and base shop personnel, appeared for work. Sprayberry told the JEFM group that Hill wanted to see them and they went to the Break Room to await his arrival.[18] Meanwhile Hill was at the base shop where he met with the group who had returned to work there. Hill told them that he had no work for them at that time, Employee Woodbury quoting him as saying, "Due to the rearranging of work schedules, we don't have any work for you today." No other employee present at this meeting was called to testify but Director Hill's version does appear to be in substantial accord, adding that he told the men that he had already made arrangements for that day and "if their intentions were to come back they should notify me so I could make arrangements to put them back to work." In his testimony Hill explained at length the extent to which arrangements had been made on the previous Friday, September 4, when the JEFM employees refused to accept permanently their reassigned work stations and had again walked out, in the company of the base shop group. Thus, to insure that the production at the base shop would not be curtailed if the group remained out on the following Tuesday, September 8, and thereafter, reassignments of work loads and duties were made among employees and supervisors in the several shops comprising the base shop area and on Tuesday morning when the men appeared for work these prior arrangements for that day's

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[18] The testimony of Knowlton.

emergency operations prevented putting the people immediately to work. I credit Hill's explanation of this situation as it existed when the base shop employees thus presented themselves. I do not at this point, however, pass judgment on the wisdom of the decision.

Following Hill's refusal to permit the returning base shop strikers to resume their work all of them got into their cars and in a noisy cavalcade proceeded to the JEFM shop area where the returning 26 JEFM strikers were still awaiting Hill's arrival from the base shop. Before Hill could arrive to speak to them Knowlton and the other JEFM returnees went out to confer with Woodbury and the base shop group. Upon learning that these people had been prevented from working the JEFM group again walked off, not having yet learned whether work was available for them. Both groups thereafter met with Christian of the Union who again communicated with Respondent in their behalf by telegram dated September 8, stating

> Be advised that the groups that were locked-out and the group that walked out protesting the company's discriminatory actions on September 8, 1964 will report for work tomorrow September 9, 1964 at their regular time. This is to request that their timecards be placed in their regular place in order to eliminate any confusion or misunderstanding. The group desires to work but they want their legal rights respected.

Thereafter on the same day Respondent dispatched the following telegram to each of the employees involved:

> Although your walk-out last week was unwarranted, nevertheless, we have rearranged our work schedule to accommodate your services. You are therefore notified that you may return to your wok at the usual time on Wednesday 9 September 1964.
>
> John S. Hill
> Director of Aircraft
> Maintenance

All of the employees involved returned to work on the morning of September 9 without incident and took up their usual duties. The employees in the JEFM shop who originally struck in protest of the changed work area assignments returned to their *new* stations, and except for minor operational changes, these assignments were regularly maintained thereafter.

13. Further questioning by Company officials

In the comparative quiet that pervaded for the next several weeks[19] representatives of Respondent and the Union met and bargained in behalf of the fire fighting employees for whom the Union was the certified representative. The bargaining sessions were well attended, it appears, not only by representatives of the principles but by active Union adherents among the employees from other parts of the base. These spectators referred to themselves as "the gallery" and included Employee Knowlton who was also active in the series of walkouts which had just subsided. During one of the breaks at the September 9 bargaining session Assistant General Manager Hood walked up to Knowlton and, noting the steward badge he was wearing, asked him who he was and if he were among those who had walked out.[20]

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[19] During this period, it will be recalled however, that Sprayberry, upon questioning Employee Gooday and finding that he favored the Union told him that the Union would jeopardize their jobs (*supra*, p. 45).

[20] The credited testimony of Knowlton corroborated by Hood who admitted to the conversation, describing it as one in which he introduced himself to Knowlton whom he had not met before and whom he believed to be active in the Union.

I do not credit so much of Knowlton's testimony, however, to the effect that by Hood's so-called interrogation of him he "was still just as scared as if /he/ had been at the base." From my observation of Knowlton, from the credited evidence of his militant leadership in the Union, and from the circumstances surrounding the conversation, as described by him and Hood, I am convinced that he was neither scared then nor thereafter nor did he appear to be of the temperament to scare easily.

## 14. The firemen's dispute

### a. *The walkout*

As negotiations for a firemen's contract continued at headquarters level in a local hotel, events back on the base did not suggest the same spirit of negotiation. Thus on September 14 Employees Ressie Chodrick, a most active Union leader among the employees (*supra*, p. 15) and shop steward of the firemen's unit, sought out Fire Chief Moxley on the morning of September 14 and requested that he discuss with Chodrick a number of pending grievances. Moxley advised Chodrick that this was not the proper time to hear and process grievances and refused to discuss them. Whereupon Chodrick repeated his request and Moxley again denied it. Chodrick then advised Moxley that unless the grievances were handled the firemen would walk out. Moxley consulted with Assistant General Manager Hood who appeared on the scene and was presented with the same request by Chodrick, who, when again told that there was an established time for hearing grievances, replied that "the people wanted the grievances heard when they wanted them heard." Upon Hood's refusal to accede the firemen at the main base walked out under the leadership of Local President Kelsey Hawkins and Chodrick and the firemen at the auxiliary bases were notified by Chodrick to do likewise. Upon securing proper safety clearance at these fields later in the day the firemen there joined the walkout.[21]

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[21] Assistant General Manager Hood provided his version of the details set forth above. Fire Crew Chief Jay Crowley credibly testified as to the effect of the September 14 walkout upon the Perry Field firemen where he was stationed.

Employee Chodrick was the only General Counsel witness whose testimony alluded directly to the details of the firemen's walkout. Thus when he was asked if he had ever engaged in union activities of which the Company had knowledge Respondent's counsel, to expedite the proceeding, stipulated that it was fully aware of Chodrick's union activity and of the fact that of all the employees he was the only one appearing as a witness at the earlier representa-

b. *The offer to return*

At this point normal avenues of communications between all the parties concerned appear to have been superceded by the telegram. Immediate efforts were made on all sides to effect a return to work,[22] the method of effecting it depended upon the viewpoint of the party writing the message. Because it has been claimed on the one side that unconditional offers to return were not made and on the other that obstacles to return were set up and a lockout, in effect, instituted, I shall set forth, with regret for the

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[21] (Continued)

tion hearing. When counsel for the General Counsel then sought to question Chodrick further on his activities "to prove that this man was more active than the others" I precluded him, indicating that the stipulation adequately established this fact, as I now find that it does. In an excess of caution counsel sought to make an offer of proof of Chodrick's activity, which I indicated he might do. Counsel then sought again to question Chodrick along the same line, asking him if he ever led a walkout, in further effort to establish that the Company was aware of this Respondent's counsel again agreed to stipulate, this time as to Chodrick's leadership of the walkout; a stipulation which I also accepted and rely upon herein. I have, nevertheless, rejected the offer of proof of Chodrick's prominence in the Union, subsequently made in writing, in view of this stipulation offered by Respondent and upon which I now find.

The offer of proof does contain, however, the details of the September 14 walkout, an issue that General Counsel had never indicated in the course of his questioning he was seeking to establish by Chodrick's testimony and which arose only in this questioning as it related, tangentially, to proof of company knowledge. I would not be disposed, therefore, to consider this offer as evidence of the September 14 event. It is also to be noted, of course, that I have not credited Chodrick generally. (*supra,* fn. 4)

Under the foregoing circumstances in the absence of credible evidence presented by the General Counsel and in the absence of countervailing evidence presented by Respondent I accept Hood's account of the walkout.

[22] On this point I specifically reject Assistant General Manager Hood's unsolicited remark in the record that the only reason for the walkout was to embarrass the management upon the visit to Vance of an Air Force Inspector General's team.

burden it creates to this decision, the exchange of communications relating to the September 14 dispute. Thus a telegram from Christian to President Miller dated September 10 describes the grievance sought to be resolved:

> Be advised that Smoke-Eaters Lodge 898 of the International Association of Machinists protest the recent unilateral changes in the working conditions and work assignment of the fire department unit namely painting and mechanical work and request that these conditions be returned to status quo.
>
> Harvey Christian, Special Representative
> International Association of Machinists

On September 15, the day following the walkout, at 10:07 a.m. another telegram from Christian to Miller announced the walkout, setting forth acceptable terms for settlement:

> Be advised that members of Smoke-Eaters Lodge 898 Firemen's Unit walked off their jobs at Serv-Air Inc. in protest of the company's unreasonable and arbitrary action of refusing to accept and discuss grievances arising from unilateral and arbitrary changes in working conditions in job assignments in the bargaining unit without negotiating these changes with the union. The union is requesting an immediate meeting to discuss this dispute in order that the firemen can return to their jobs under normal and usual conditions. An immediate reply is requested.
>
> Harvey Christian, Special Representative
> International Association of Machinists

Miller's telegraphic reply to Christian on the same day at 2:45 p.m. stated

> Please be advised that members of Smoke Eaters Lodge 898 were asked why they walked off the job and they stated specifically that they were leaving because they could not get their grievances heard at the time they

demanded. We respectfully reject the reasons stated in your telegram of this date as the basis for the firemen's unwarranted walkout. Serv-Air has never refused to accept and discuss grievances from fire department employees. We have established a scheduled time for firemen to present grievances to the fire chief, and the firemen were aware of this schedule which is posted in the fire station. We completely reject your charge that we are requiring unilateral work of the firemen as referenced in our letter to you of 11 September wherein it was pointed out that the firemen were performing first echelon maintenance and housekeeping functions to include interior painting which the firemen have always previously performed and considered their normal work requirements. Not having the firemen available for duty when needed, has forced Serv-Air to plan and train other personnel in order to meet certain test requirements imposed by the inspector general team, headquarters, ATC, which are classified. This work load, along with other requirements must be accommodated. Therefore, we will be pleased to meet with you Wednesday to discuss the firemen's interest in returning to work and will contact you relative to a mutually agreeable time. Please understand that we will not, repeat we will not, discuss any so-called grievances at this meeting.

Truman W. Miller
President, Serv-Air Inc.

Before Miller's telegram had been received (at 4:34 p.m.) Christian dispatched a second telegram to Miller (at 2:59 p.m.) which he claims to be the strikers' unconditioned offer to return. It states as follows:

Be advised that the members of Smoke-Eaters Lodge 898 International Association of Machinists who would be customarily scheduled to work tomorrow Wednesday September 16, 1964 will report to work on their regu-

lar job and place and in their usual manner. Be further advised they are interested in returning to their jobs and remaining on their jobs as long as the company doesn't create new instances that would cause another disturbance.

Harvey Christian, Special Representative
International Association of Machinists

That same evening of September 15 Miller replied to Christian's earlier offer stating:

The conditions set forth in your telegram are unacceptable to Serv-Air relative to firemen returning to work Wednesday inasmuch as the firemen walked off without justification and the basis of their return to employment would have to be unconditional; and that they may be depended upon to provide the service for which they were employed. Serv-Air specifically rejects your inference that the company has created any instance which would justify the irresponsible walkout of the firemen. In the absence of adequate assurance that the firemen's proposal to return to work will be unconditional and in view of the fact that we have programmed our work requirements on the basis that the firemen would not be at work Wednesday (16) September 1964, we will not require their services on that date. This telegram does not supersede our offer to meet with you tomorrow.

Truman W. Miller
President, Serv-Air Inc.

Thereafter on the afternoon of September 16 Christian complained to the Regional Director of the Board that Air Force personnel were being used as replacements performing the firemen's fighting and rescue duties on the flight lines and elsewhere at the base. On the following day, September 17, he again wired the Regional Director, this time referring to his earlier telegram of September 15 as "restating" the

union position that the firemen were "ready, willing and able to return to their jobs unconditionally"; to which Miller wired a rejoinder, also on Thursday, September 17, to the Regional Director and Christian stating the Company's position that the September 15 offer to return was not acceptable because it was not unconditional and that the men could return on Saturday, September 19 if the Union's most recent telegram to the Regional Director was intended to constitute an unconditional offer. Meanwhile on September 16 at 6:15 a.m. seven of the firemen at Perry Field made themselves available for work but were told by Respondent's auditor, Robert Van Buren, that no work was available for them and they returned to their homes.[23]

As all of the foregoing communications were in transit Hood, in behalf of Respondent, and Christian met with a Federal mediator where the dominant issue appears to have been whether or not the offer to return was or was not unconditional. The Company was adamant that the unconditional nature of the offer be stated with precision; whereas Christian, relying on the language of his telegram (*supra*) setting forth the terms of the employees' return restated it at the meeting, Respondent would not accept it. Finally, on September 17, after Hood and the Federal mediator had suggested language which they believed would clearly indicate the employees' intent, the firemen at Perry Field signed an unconditional offer to return which the Company accepted unconditionally. The remaining firemen followed suit and all returned to work on Friday, September 18.[24]

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[23] The credited, undenied testimony of Employee Jay Crowley. Van Buren was not questioned on the subject when called as a witness by the Respondent.

[24] The employees who engaged in this walkout were stipulated to be the following, and appear as Appendix H in the consolidated complaint:

| | | |
|---|---|---|
| Ernest W. Adams | Gordon T. Edwards | J. L. Niles |
| Elmer L. Allen | Robert L. Fields | Dickie D. Pritchard |
| Billy J. Avery | Marshall Frazier, Jr. | Charles A. Ramey |

15. The buttons and badges

The heightening tempo of the organizing campaign was manifest by the increasing frequency with which Union adherents indulged in the practice of wearing varieties of badges indicating their Union allegiance. These badges took many forms, a number of which were displayed at the hearing and appear among the exhibits. Thus Union adherents appeared at their work stations with pencils in their shirt pockets bearing the Union insignia on the clip. The shop stewards, of whom there were a considerable number, wore plastic badges prominently indicating their position and bearing the inscription "Justice on the Job," with Union insignia. Others wore an improvised badge consisting of a piece of paper 3 inches in diameter pasted on a smaller plastic button, on which was crudely printed "I am a Union member." Still others wore a red 2¼ inch plastic button, "IAM meets tonight." Throughout the early Fall the more active Union people wore one or more of these insignia or hand painted facsimiles of them, but by mid-October multiple badge wearing became the custom. Not only were employees wearing two or more badges on their shirts and hats, plus the IAM pencil clip in their pocket, but some of

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[24] (Continued)

| | | |
|---|---|---|
| Olin N. Ashcraft | Weaver D. Gamble | Leonard H. Randolph |
| Robert L. Boon | Jerry B. Grammont | Lawrence D. Rowe |
| Robert L. Bratcher | John R. Grewell | Jack R. Roy |
| Cecil F. Carroll | Francis A. Harris | Charles G. Sanders |
| Jimmie R. Caywood | Kelsey C. Hawkins | David D. Schroeder |
| Jim R. Chestnut | Donald L. Hildinger | Robert J. Sedbrook |
| Donald R. Clark | Willis E. Johnson | Andrew F. Sima |
| R. A. Chodrick | Ronald D. Kihega | Sanford E. Stark |
| Lewis F. Coulter | Marlow Kirk | Sammal P. Stinson |
| Harvey S. Crabtree | Hubert E. Leckie | James H. Sturgeon |
| Jay D. Crowley | Amel L. Letellier | Billy D. Tooman |
| Harold W. Daugherty | Delbert B. Luginbill | Paul W. Torre |
| James H. Dehaas | Harold L. Lunsford | Ronald B. Treat |
| Myron W. Dodd | John C. Madison | Wilbur E. Unruh |
| Donald E. Dodson | Michael V. Mitchell | Larry R. Voss |
| Roy L. Eastin | Dallas Myers | Eugene R. Webber |

them appeared with small signs pasted on their backs. Thus Employee Knowlton, for example, not only wore two badges each on his hat and shirt but had a 14 inch inscription taped to his back, "Don't be a fink, come to the Union meeting tonight at 7:30 p.m." Employee Peckham wore a similar sign on his back. It appears, however, that some of the employees had actually been wearing more than one button at a time as early as August 27, and many of them, with Company approval consistently wore plastic name tags affixed to their shirts. Assistant General Manager Hood, himself, wore this type of identification tag as well as a badge worn by many officials and rank-and-file employees who were opposed to the Union. This was a 2¼ inch white plastic badge with the following inscription

I am for Vance
"Keep 'em flying
No Union wanted

Beginning on October 19 Respondent commenced positive action to eliminate the mass button wearing among the employees. Thus Hood concedes that Sprayberry called the situation to his attention on October 19, stating his feeling that the "badge and sign business" was getting out of hand; that feelings in the shop were running high because of it; that the men "looked like a bunch of clowns"; and that safety at the base was being jeopardized. Accordingly it was determined to take restrictive action.[25]

Previously, on October 15 Employee Knowlton with buttons achest and a taped message on his back was called into Sprayberry's office together with Employee Peckham who was similarly adorned and was also wearing a button 5 inches in diameter. Sprayberry in the presence of his assistant, Lolmaugh, and Foreman Klepfer, told the men he

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[25] The testimony of Hood which I accept on this point. The facts with respect to the badge wearing episode and its curtailment (*infra*) are not in dispute. Respondent's purpose in restricting the wearing of badges *is* in dispute..

thought their signs were childish.[26] He then told them to take the badges off and the men refused, stating their right to wear them. They did compromise, however, by removing their back signs. The men returned to work and continued thereafter to openly wear the several buttons they had previously worn on their persons. Thereafter on October 19 Sprayberry again sent for Knowlton and also for Employee Ken Edwards. He told them that hand painted signs and buttons and defaced anti-union buttons would not be permitted to be worn. Whereupon Sprayberry gave the two men the option of removing such buttons or "go home." They refused to remove them and Sprayberry punched out their timecards.[27]

On the following day, October 20, Sprayberry sent for Employees Billy Ming and Peckham and asked them, in the presence of his assistant, Lolmaugh, why they were wearing the badge "I am a union member," noting they were also wearing steward's badges. After some conversation on the need for the badges Sprayberry told the two he would give them the same choice he had given other badge wearing employees on the previous day—they could wear one badge or the other or leave. Assistant Manager Hood appeared at this point in the conversation and supplemented Sprayberry's remarks by saying that the badges were getting out of hand, and that as they were working for the U. S. Government they had to make a good appearance before higher officials. He then said he felt that the whole button and badge affair had been intended as harassment of management. Whereupon Ming denied Hood's accusation and referred him to the badge that he (Hood) was wearing—the previously described "no union wanted" badge. (*supra.*) Hood then repeated Sprayberry's utimatum permitting the wearing of only one badge, and when the

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[26] Knowlton testified that the maximum number of badges he wore on any occasion were two on his chest and two in his hat.

[27] The credited testimony of Knowlton.

two employees refused to comply he directed Sprayberry to punch out their cards, stating that they could come back to work if they took the badges off.[28]

On the same day, October 20, Respondent posted a notice respecting the wearing of buttons. It read as follows:

ADMINISTRATIVE CIRCULAR
NO. 9

SUBJECT: Wearing of Buttons or Badges by Employees

1. Effective immediately Serv-Air Employees will be permitted to wear only one button on their uniforms or outer garments while on duty. This can be one (1) union button or one (1) company button. This policy has become necessary for the following reasons:

   A. Many employees work around and on Jet Engines where the wearing of any unnecessary buttons or badges becomes a safety hazard.

   B. In order to maintain the appearance of a responsible working organization to our customer, the United States Air Force.

   C. The indiscriminate use of all types and kinds of buttons is causing disharmony among all employees.

2. Directors will take action to implement this policy immediately.

3. A copy of this circular will be placed on our bulletin boards.

/s/ John M. Hood
JOHN M. HOOD
Assistant General Manager
Serv-Air, Inc.

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[28] The credited testimony of Ming.

By the time this notice had been posted, however, other employees had been confronted with the same alternatives as had the above four, and each went home. All employees who left in this fashion prior to the posting of the notice were sent the following letter:

> This is to confirm to you that you have not been terminated from employment with Serv-Air and to further state to you that we will be happy for you to return to work provided you will abide by rules and regulations established by the Company regarding the wearing of badges and buttons and other adornments on your uniform. Serv-Air recognizes and has always recognized your right to conduct legal Union activity as your conscience dictates in accordance with the rules of the National Labor Relations Board and Serv-Air's policies and procedures. Serv-Air's policy in this regard prohibits Union activity during working hours on plant premises.
>
> Serv-Air's decision to restrict the use of adornments on outer garments among all employees is necessary for several reasons, and in no way has any connection with your membership or any union activity that you have engaged in. A copy of Administrative Circular No. 9 spells out the reasons for this policy and is enclosed.
>
> We regret that we had to send you home as a result of your defiance and refusal of our request to wear only one button or badge. You must realize that our rules and regulations must be applied indiscriminately to all employees.
>
> Again this is to inform you that you are free to return to work at any time with the provision that you abide

by rules and regulations that all other employees have to abide by.

/s/ John S. Hill
JOHN S. HILL
Director,
Aircraft Maintenance[29]

Following the posting of the notice on the 20th, others who were wearing a profusion of buttons were summoned to the office, asked by either Sprayberry or Lolmaugh if they had read the notice, and were given a choice of either complying or clocking out. These employees included Victor Lankard, Ernest McCalvin and Richard Canady, all of whom clocked out on October 23. Previously on October 21, after the notice had been posted, Employee Thomas Willson was given a similar ultimatum by Sprayberry in his office. After directing Willson to return to his shop and make up his mind Sprayberry followed him there and spoke to a number of the employees who were also wearing badges. After first singling out Employee Gooch and dismissing him upon his refusal to remove his badges Sprayberry told the remaining employees, including Willson whose account of the episode I credit, that unless they removed the badges they would be clocked out. They all left.[30] It was stipulated at the hearing that during the same October 21-23 period a considerable number of other employees were terminated under the same circumstances for the same reasons. These and the dates upon which they were terminated were:

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[29] It is stipulated that this letter was sent to the following employees: Robert Knowlton, Franklin Brockway, Donald Peckham, Kenneth Edwards, Thomas Anson, Billy Ming, Robert Kuhlmeier, Van Ringgold, and Thomas Scaia.

[30] This October 21 group included, according to Willson:

| | | |
|---|---|---|
| Richard Spoonhoward | Kenneth Gritz | Philip O'Daniels |
| Edward J. Rollo | Eldon Greer | Willard Beebe |
| Larry Knapp | John Blankenship | Gary Struble |
| Stephen Ladd | Darl W. Long | Archie Murdy |

| | | | |
|---|---|---|---|
| Winfred B. Haines | Oct. 21 | Jack P. Brazzel | Oct. 22 |
| Teddy E. Edwards | Oct. 21 | Roy D. Woodbury | Oct. 22 |
| Ronald A. Yoder | Oct. 21 | Bobby Meadors | Oct. 22 |
| Jesse E. Payne | Oct. 21 | James Pruner | Oct. 22 |
| Marvin L. Turner | Oct. 21 | Larson L. Brown | Oct. 22 |
| Ewald E. Schultz | Oct. 21 | Ferris L. Collier | Oct. 22 |
| George W. Jones | Oct. 22 | William F. Wilkerson | Oct. 22 |
| Vernon O'Dea | Oct. 22 | Robert E. Summers | Oct. 23 |

The Respondent thereafter on October 25 suspended the enforcement of its rule respecting the wearing of badges, and beginning on October 26 the men returned to work, many of them continuing to wear their respective assortment of insignia. On October 27 Respondent posted its Administrative Bulletin, No. 10 noting the opposition of employees to the badge rule and announcing an immediate suspension of the rule pending final determination of the legality of it by the Board (referring to the instant proceeding).

16. The employee election petition

Beginning sometime in late October 1964 and during a period until shortly prior to January 8, 1965, approximately 557 of Respondent's total civilian complement at the base, estimated to be approximately 1100, signed a petition directed to the Regional Director of the Board's Sixteenth Region. Although alleged in an amendment to the complaint as "an anti-union petition" circulated for the purpose of interfering with employee statutory rights, the petition itself bore the heading:

> WE THE UNDERSIGNED EMPLOYEES OF SERV-AIR, INC., HEREBY MAKE KNOWN OUR REQUEST THAT THE QUESTION OF UNION OR NO UNION BE BROUGHT BEFORE US IN AN ELECTION.

The letter of transmittal to the Regional Director, signed by Panthea M. Cauldwell, a clerical employee,[31] who appears to have been the most active in procuring the signatures, elaborated on the stated purpose, thus,

> We, the employees as shown on the attached petition, respectfully request that your office conduct an election among the Production and Maintenance employees of Serv-Air, Inc. The present situation is causing much disharmony and is detrimental to the morale of all the workers at Vance AFB, and could, if allowed to continue over a long period of time, result in a disruption of the mission at Vance AFB and therefore jeopardize all employees' jobs.
>
> We feel that we have been discriminated against by not having the privilege of voting in the election held May 6 at Vance AFB and that we should have a vote in this matter at the earliest possible time.

On this petition are the signatures of four individuals claimed to be of supervisory rank: Donald Klepfer, E. L. Smith, Morris Shackley, and William L. Huston. Their supervisory status was denied by Respondent and counsel for the General Counsel adduced considerable testimony in support of his claim that they were.

Donald Klepfer, known to the 15 or 20 men who worked under him as senior mechanic and a leadman, directed them

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[31] Counsel for the General Counsel sought and obtained a stipulation that Miss Cauldwell was a clerical assistant to a Mr. Kenneth Price, without further identifying Mr. Price. Even were I to assume that this gentleman were a high company official, I would draw no inference from that fact in derogation of the petition. That a clerical employee is directly supervised by a high official is certainly grounds neither to exclude her from the bargaining unit, nor indeed, as is suggested here, to deprive her of her Section 7 rights to engage in what would appear on its face to be a protected activity. Employees may not be deemed to lose rights merely by working for major supervisors rather than minor ones.

as to what engines they would work on, (*sic*) on them if he found them not working, did no manual work, attended meetings in the office at which other supervisors were in attendance, temporarily reassigned employees from one work station and duty to another, and on a number of occasions directed employees to report to the office. Upon the foregoing I would conclude and find that Klepfer is an agent and representative of Respondent and also that he responsibly directs employees in such a manner as to denominate him a supervisor as defined by Section 2(11) of the Act.[32]

William L. Huston, another senior mechanic and leadman, also assigned men to specific tasks and engines. He has excused absences and has granted permission to employees to take time off, assigned them to overtime work, criticized them for failures in their reports and paperwork, and has attended supervisory meetings.[33] Upon the foregoing I conclude and find that Huston is a representative and agent of Respondent and responsibly directs employees within the purview of Section 2(11) of the Act thus constituting him a supervisor.

In addition to affixing his signature to the petition as did Klepfer and the other two, Huston, in the presence of Leadman Smith,[34] walked through the aisles of the sheet metal and machine shop carrying the petition. Employee Turner noted this and called to Huston, asking him to bring the petition forms to him. Huston complied, stating "We

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[32] The credited testimony of Employees Ming, Kuhlmeier, and Knowlton, as well as Klepfer's own explanation of his duties.

[33] The credited testimony of Employees John Hill, Knowlton, Hevr, and Turner.

[34] In view of my conclusions as to Klepfer and Huston I find it unnecessary to burden this decision with further findings as to the supervisory status of Smith and Shackley. To do so would, in my estimation, simply constitute surplusage.

want to get an election; get this over with one way or another. We do not want no union." (Tr. 648)[35]

17. The JEFM reduction in force

As previously noted earlier in this decision (*supra*, p. 12), the Aircraft Maintenance Program administered for the Air Force by Respondent was subject to revision as the needs of the service and the improved efficiency of the engines dictated. Thus, for example, it was determined that the periodic inspection of the J-85 engine by personnel of the JEFM shop need no longer be performed after every 100 hours of engine use. When the engine first went into service the periodic inspection interval was 50 hours, and thereafter raised to 100. During 1965 numerous conferences were held which representatives of the Air Force and Respondent attended, and where it was sought to decide the major improvements that would be necessary to make a 200-hour inspection interval possible, and what a base would have to do to maintain such a 200-hour engine. In these conferences numerous technical problems were presented for solution and the net conclusion was that upon the completion of a certain amount of retooling, and the establishment of new procedures 200 hours of periodic inspection interval would be approved by the Air Force Training Command. The Vance facilities were the first of the Training Command bases to be qualified for this improved maintenance inspection program. On September 2 the Respondent received from the Air Force "work cards" which set forth in detail the newly established procedures. Study of these procedures, establishing as it did that inspections of J-85 engines would be reduced by one half, indicated that a reduction in the work force would then be in order. Accordingly, on October 12 Director of Aircraft Maintenance Hill notified Assistant General Manager Hood of this prospect and indicated that a survey would be made to

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[35] The credited and undenied testimony of Employee Marvin L. Turner.

determine the extent of the reduction. Based upon the data supplied by the Air Force it was determined that the personnel of the JEFM shop could be reduced 20 percent from its present complement of 80 employees.[36] This meant that a reduction of 16 would be in order. By early November, as plans were developing to select those subject to termination, eight employees had already left through normal attrition, leaving only eight to be disposed of by termination procedures.[37]

Meanwhile, in anticipation of the pending layoff, Hill wrote to the Air Force on October 14 advising that a reduction in force of eleven would be effected in the JEFM shop on October 23 and requested that the Training Command "be queried to determine if there are other requirements in the foreseeable future that would justify [Respondent] retaining these people." Major John H. Westbrook replied on October 22 that his office had "no knowledge of any additional requirements at this time." Accordingly, plans for the selection of candidates for layoff which had already begun were then accelerated. To this end charts had been prepared by Sprayberry and his assistant, Lolmaugh, whereon each employee's name appeared along the left margin and a series of blocks provided spaces for ratings under specific categories with space provided at the far right to accommodate each employee's aggregate rating. The categories in which the employees were evaluated were

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[36] There appeared to have been 86 employed there on September 4 when the work stations were reassigned (*supra*, p. 30).

[37] The foregoing details concerning the administration of the periodic maintenance program is the undenied testimony of Director of Aircraft Maintenance Hill who was directly responsible for its implementation and whom I credit in this respect.

Counsel for the General Counsel stated on the record that he was not contesting the necessity for the layoff which followed, stating that "at some time in the fall of 1964 there was a need to lay off some employees." Counsel's case rests rather upon the selection which Respondent made of employees to be laid off.

the following: Seniority, Production, Job Ability, Initiative, Temperament, Job Attitude, Attitude Toward Supervision, Acceptance of Rules and Regulations, Harmony with Co-Workers. In each category except Seniority provision was made for five separate ratings ranging from Poor to Outstanding; a candidate being marked Poor receiving only one mark in the category, whereas a candidate being marked Outstanding would receive marks in the four other rating possibilities as well, giving him a possible maximum of five for each category. In the category of Seniority a mark was given for each year or less of service up to and including 5 years. It was determined that those with the lowest aggregate rating would be laid off.

On the morning of November 6 a number of the JEFM employees were summoned to Sprayberry's office where Director of Aircraft Maintenance Hill was waiting for them. The employees, all of whom were known by Respondent to have been active in the Union and who had frequently attended bargaining sessions as interested spectators, were Thomas Anson, Jesse Bayne, Franklin Brockway, Thomas Scaia, Robert Knowlton, Victor Lankard and Robert Kuhlmeier. Employee Eldon Greer was also summoned but was absent on sick leave. Hill handed Sprayberry letters which the latter distributed among the men. The letters, addressed to each individual present, were identical in content and read as follows:

> We regret to inform you that your services will no longer be required as of the close of business November 1964, due to a reduction in the work force in the JEFM shop.
>
> This reduction in work force is required due to the change from 100 hours to 200 hours in the repair and inspection cycle of the J-85 engine. In an effort to preclude this reduction in force, Serv-Air queried the Air Force to determine if there were any future work requirements that would justify the Company main-

taining all personnel presently employed in the JEFM shop. The Air Force has notified us that there are no foreseeable work requirements that would justify our retaining all personnel in the JEFM shop. Similar reductions have been programmed for all JEFM shops in Air Training Command.

Supervisory personnel of the JEFM shop and this office have completely reviewed the work records of all personnel in the JEFM shop and selection of personnel to be laid-off was based on production, efficiency, seniority, and other pertinent factors.

You will be given first consideration on any job that comes open in the Company for which you are qualified. You will receive 2 weeks pay in lieu of notice which we hope will be of material assistance to you and prevent any undue hardship until you can find other employment.

We appreciate the services that you have rendered Serv-Air during your employment and wish you well in the future.

/s/ John S. Hill
JOHN S. HILL
Director,
Air Craft Maintenance

Because it is claimed that these individuals thus selected for layoff were victims of Respondent's reprisal for their acknowledged activity in behalf of the Union I shall consider each individual separately. In this respect it is to be noted, however, that certain facts and circumstances are common to all eight. Thus they were all designated stewards of the Union in late August, they all participated actively in the organizing drive mounted in early September, they participated in the several walkouts previously described (*supra*), were the alleged victims of a

reassignment of work areas, were the most prominent in the button wearing dispute, and were each given a letter laying them off until they complied with the button rule. With several exceptions noted hereafter it is stipulated that none had previously been the subject of prior disciplinary action,[38] and it is further stipulated that the Respondent was fully aware of their respective union activities. Employees concerned never saw the rating chart which formed the basis of their layoff, and finally that they never discussed either the chart or the several categories contained thereon with their supervisors.

*Thomas D. Scaia,* a JEFM Crew Chief and a member of the Union since October 1963, wore his union insignia constantly since then and on August 31, 1964, as the most active of the shop stewards, organized the recruiting drives for new members which took place in the several hangars and work areas around the base and which provided the backdrop for the discharge of Employees Haley and McCarty (*supra,* 21-29). On that same day Scaia was summoned to Sprayberry's office where Director Hill was waiting for him. Hill presented him with a warning notice signed by himself and Sprayberry which stated that he was being warned for

> lack of production in that his crew has constantly turned out the lowest number of engines of any of the fully manned crews over a two month period. This is caused wholly upon his lack of interest, initiative, productivity and attitude towards his work. Immediate improvement in these areas is mandatory.

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[38] There are in the record Certificates of Training issued by the Air Force to all these employees. It appears that all the employees in the JEFM shop are at some time required to take specified technical training. I attach no significance whatever to the evidence that the eight involved here may have satisfied what appears to have been a general in-service training requirement.

It is stipulated that this was the first disciplinary action ever taken against Scaia. When asked for comments upon the warning Scaia indicated to Hill that he had none and left the room. Prior to this, according to Scaia, no one ever discussed his productivity with him. He conceded on cross-examination, however, that his production was in fact down, and when asked if he gave Hill any assurances of improvement he replied that he made no comment but that he immediately left and filed a grievance for having received the warning letter.

When Scaia was shown his rating upon which his selection for layoff was determined this, except for the August 31 conference, was the first and only time he had been appraised for the several categories upon which he was being rated. He received the rating of 17, thus being in a tie for the fourth lowest score in the shop.[39]

*Robert J. Kuhlmeier* appears to have been the second least senior of any of the eight laid off, having been hired on February 17, 1964. He testified without contradiction that during his tenure he was never criticized by his supervisors. When he was notified of his rating he had not, to that time, nor since seen the chart nor discussed his status with anyone. He was rated at 14, being the second lowest of the employees rated. In this respect it is to be noted that he received only one of a possible five points for seniority, and one of a possible five for production. With respect to these two factors which appear to have contributed mightily

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[39] The foregoing is based upon admissions by Scaia at the hearing. Having observed him during the hearing I am not disposed to and do not rely upon his testimony except as it constitutes, as here, admissions against his interest or is corroborated by credible witnesses. Thus I do not accept his assertion that he does not understand the rating chart and the grading system used. It is simple in construction and capable of being understood by one of normal intelligence. His stated failure to comprehend it is deemed to be more the result of his belligerence as displayed on the stand and at work rather than a lack of intelligence.

to his poor score Kuhlmeier testified that he considered seniority and production to be proper rating scores. His complaint then was not the categories used but the manner in which they were applied to the rating in his case.

*Robert L. Knowlton* does not appear to have been a stranger to the rating process, having been called to Sprayberry's office in July and confronted with a rating sheet similar in detail to the chart used for the November 6 layoffs. The categores then were much the same and Sprayberry had discussed these with Knowlton as they applied at that time to his situation. Thus, according to Knowlton, he explained that since he had taken Knowlton away from certain employees his attitude was a lot better and that he was raising it to "Good." At the same time it appears that Sprayberry indicated that they were then removing from Knowlton's file the record of an oral reprimand previously given him. Respondent makes no representations, however, that Knowlton had previously been subject to discipline.

A review of Knowlton's position on the layoff rating chart indicates that he had a rating of 16, being the third lowest of all rated. A breakdown of categories discloses further that of a possible five in each he was rated as follows: Seniority—2, Production—2, Job Ability—3, Initiative—3, Temperament—1, Job Attitude—1, Attitude towards Supervision—1, Acceptance of Rules and Regulations —1, Harmony with Co-Workers—2. None of these were ever discussed with him between the July incident and November 6.

*Victor H. Lankard* commenced work in June 1964. Excepting only his connection with the button incident he was never disciplined during his five months of employment. He was rated 22, being tied with Employee Gooday for the position of eighth lowest of those rated. Gooday was also a Union member but was not laid off. He did have nine months more seniority than Lankard, who appears to have been the least senior of all, but was rated as having

less Job Ability and Initiative. It was Gooday who had previously been interrogated by Sprayberry and who also testified that on November 6 he voluntarily walked off in protest of the layoff of the other eight.

*Thomas E. Anson* was given a rating of 20, his rating in Attitude towards Supervision being "Poor." Like the others he had no prior notice of his status and had been subject to no disciplinary action excepting the button incident.

*Franklin Brockway* was first employed on February 10, 1964, a week before Kuhlmeier, thus receiving only one point for Seniority. He did have three and a half years of prior experience with jet engines while in the Air Force. His total rating was 20, ranking him as tied for seventh lowest of all rated.

*Jesse E. Payne* was also hired on February 10, 1964 and has thus accumulated but one Seniority point. His rating, which he had never previously discussed with any supervisor, was 24.

*Eldon G. Greer*, unlike the other seven who were terminated on November 6, was absent from work on sick leave. Upon his return on November 12 he was given the same termination notice as were the others (*supra*, p. 53).

Greer was a crew chief in the JEFM shop and had a record of 14 years of service at Vance, the last four being with Respondent. On the chart prepared for the November 6 layoff Greer received a rating of 19, receiving but one point each in Initiative, Temperament, and Attitude towards Supervision. When asked if he had ever been criticized Greer admitted to a reprimand by Sprayberry in Mid-1963 thus,

> While I was more or less not staying in the dock; I was running around the hangar more than I should, and they thought. (TR. 689)

Greer also admitted to a further "oral jam session" with Sprayberry concerning things he was doing wrong, ending in what appears, from Greer's confused account, to be the presentation to him of a written warning. And when asked if he had received any other criticism of his work he replied, "I don't know the dates, but then a number of times I have been—oh, spoken to."[40]

Earlier in the summer of 1964, and prior to Greer's wearing of a union badge, he applied for a promotion to a supervisory position and was interviewed by Sprayberry. On a résumé form submitted at the hearing by Greer in support of his application notations had been made by Sprayberry to indicate that Greer's qualifications in such categories as Ability, Obey Orders, Incentive, Dependability were "Good." On the November 6 rating chart Greer received no rating in any of these categories higher than "Fair."

A critical review of the rating chart used to determine those subject to layoff reveals the following as the 13 lowest, annotated to indicate those who are actually laid off:

| Name | Rating | Ranked Lowest | Status |
|---|---|---|---|
| Anson | 20 | 7 | laid off |
| Brown | 24 | 12 | retained |
| Greer | 19 | 6 | laid off |
| Knowlton | 16 | 3 | laid off |
| Edwards | 10 | 1 | retained |
| Peckham | 20 | 7 | retained |
| Ringgold | 17 | 4 | retained |

[40] At this point in Greer's testimony Respondent stipulated that his file contained no record of disciplinary action taken. Counsel refused to stipulate, however, that Greer's termination on November 12 had no relation to any shortcomings that he had concerning his work or conduct.

| | | | |
|---|---|---|---|
| Scaia | 17 | 4 | laid off |
| Gooday | 22 | 10 | quit |
| Brockway | 20 | 7 | laid off |
| Payne | 24 | 12 | laid off |
| Lankard | 22 | 10 | laid off |
| Kuhlmeier | 14 | 2 | laid off |

On the foregoing it is evident that the eight lowest were not laid off. Sprayberry, who with Lolmaugh made the ratings as well as these elections, explained this anomaly thus:

> That was the fourteen people that had low points on these rating charts,[41] there were eight of them on two crews. We decided, even though the people on the two crews that were laid off did not have the lowest points on this chart, in some cases, we felt it would be better to lay off two crews in the J-85 engine periodic inspection section which actually is the area of where we had to lay the people off to start with.
>
> Q. Now, were these eight people among the lowest fourteen?
>
> A. Yes, sir, they were.
>
> * * *
>
> We decided that we were going to have to lay the people off in the periodic section or a part of the section, we decided it would be best to layoff two crews that were in this low fourteen point rating.

And it is also evident that the eight selected for layoff on November 6 were the September 2 strikers who returned to work on September 3 and were allegedly segregated into two distinct work crews (*supra*, p. 51). On the other hand monthly production records of the Company subpoenaed by

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[41] The rating chart, being General Counsel's Exhibit 17 (a) and (b) shows only thirteen employees with a rating of 24 or less.

General Counsel and introduced by him into the record indicate that of all of the full crews producing during July, August, September and October, the Scaia crew was the lowest producer in July, August and October, and the second lowest in September, and the Greer crew was the second lowest in July, third lowest in August, and lowest in September and October, tieing with the Scaia crew in the later month.[42]

### 18. The Perry Field reduction in force

Meanwhile the fate of Perry Field, the auxiliary base, had been settled by a directive of November 16, 1964, of the vice-commandant of the Air Force Training Command, Randolph Field, Texas, ordering the field closed. Two days later, on November 18, Headquarters, Vance Air Force Base, notified Respondent it was terminating operations at Perry "effective this date." Whereupon it was determined that a reduction in force of seven firemen would be necessary to accomplish the curtailment of fire and rescue operations at Perry. A rating chart similar in form to the one set up for the JEFM shop layoff was prepared and consultations were had with Christian of the Union, this matter being related to the bargaining unit.[43]

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[42] The crew compositions in July and August did not include the total eight who were laid off in November as did the September and October records. In fact Edwards was the only one in either of these two crews that was in either Scaia's or Greer's crew at the outset, and he, with a score of 10 was not laid off.

[43] The foregoing is based upon the undenied assertions of Assistant General Manager Hood. Neither Christian nor Crowley, an employee at Perry, both called to testify for the General Counsel on the third day of the hearing, were questioned on the subject of the Perry layoff.

Upon the conclusion of General Counsel's case the hearing recessed for several months. During the intervening time Counsel for the General Counsel prepared a number of written offers of proof which he served upon the parties and introduced into the record over Respondent's objection. By this time Counsel for the General Counsel had rested his case and had neither moved to reopen for the purpose

By the time the selection of candidates for layoff was completed one employee had already quit and only six remained to be selected. Included among the six was Employee Ressie Chodrick, whose prominence in the Union's activities has previously been discussed. Chodrick, a fireman, had been employed by Respondent for over four years and was given the rating of 17 on the chart, the third lowest of a complement of 58. Prior to his employment by Respondent Chodrick had four additional years of experience as a fireman as a Civil Service Employee.

Chodrick, it will be recalled, was the leader of the firemen's walkout on September 15, had previously been active as the Union's shop steward, and was the Union's only witness at the representation hearing preliminary to the Union's certification of the firemen's unit. No one questions that Chodrick was the most active and militant Union member of the bargaining unit. When he was told by Hood at a meeting between Hood and Union representatives that he was selected for layoff he and Union Representative Christian immediately protested that his selection was for reasons of his Union activity and that the chart's ratings did not represent an objective evaluation of his qualifications.

Hood, in his testimony, admitted to the Union's protest of Chodrick's selection, and he also described a companion grievance that was raised. It appears that an employee of

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43 (Continued)
of supplying additional evidence nor to amend his complaint. Because I deem the matters contained in these offers to constitute little more than either an accumulation of evidence already in the record or supplementry materials relating to issues on which counsel had failed to examine the witnesses when they were on the stand I reject them as unnecessarily burdening and confusing the record.

Christian's expected testimony relating to the layoff of Chodrick was in such a category although Christian, who testified on the third day of the hearing, was not questioned on the subject nor was his return to the stand requested at any time thereafter. I specifically reject the offer directed to his expected testimony.

less than a year's service, Marler, was being retained and another, Field, with more than a year's service, was being laid off. Upon reconsideration of this case Hood reversed the decision that had been made by his subordinates, personally notified Field that he would be retained, and told Marler that he would be let go "due to his very little seniority." However, Hood told the Union representatives at that time that Chodrick's case, involving over four years seniority and eight years experience, "would have to stand."[44] Accordingly on November 25 Chodrick and five others were terminated with pay running through December 3.

19. The threat to pickets

The hearing in this matter was set originally for January 11, 1965, but did not get under way until the following day due to transportation difficulties experienced by the examiner. On the morning of the eleventh, however, the employee-members of the Union, including those not in the bargaining unit, again engaged in a strike and established a picket line at the main entrance at Vance AFB.

The genesis of this strike is worthy of note. During the Fall 1964 there had been numerous unfair labor practice charges filed with the Board's Regional Director and by November 27 two complaints had been issued, consolidated and amended. Finally on December 2, the Regional Director re-

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[44] For reasons previously stated I do not credit Hood generally but only upon admissions contrary to his or Respondent's interest. Accordingly I do not credit his denials that these selections were based upon considerations of union activity.

As I do not credit Chodrick generally I do not rely upon the statements which he attributes to Hood throughout this incident to the effect that the selection of Chodrick "goes back four years" when he was involved in a Wage and Hour grievance, or that Hood has stated that "he had the goods on Chodrick," the latter statement being allegedly reported to Chodrick by Union Representative Christian who never testified concerning it himself. (Cf. fn. 21, relating to offers of proof which I do not accept.)

scheduled to January 11, 1965 the hearing originally set for December 15, 1964. On the following day, December 3, it is stipulated that the Union wrote to Respondent stating its intention to strike on January 11, 1965, thus coinciding with the opening of the hearing. The exact purpose of the strike that was in progress on my arrival upon the scene was never disclosed on the record. It is quite apparent however, that it, like all of the Union's activities following its certification in the fire fighting unit, was for the purpose of organizing the rest of the base.

During the course of this latest strike it is claimed that a number of pickets were struck by cars approaching and passing through the main gates. And it is specifically alleged, by way of an amendment to the complaint, that Max Cumpston, Director of Base Operations, "instructed, directed and encouraged" employees to strike picketing employees with their autos. Employee Charles L. Cagle supplied the details of this incident which I accept.

On Friday, January 8, meetings of the employees were called in anticipation of the strike expected on the following Monday morning, and the ground rules respecting the strike, rights of pickets, obligations of employees, etc., were explained. At one such meeting addressed by the County Sheriff, Cumpston added his own instructions. During the question period which followed an employee asked Cumpston "what if someone stepped out in front of him, one of those pickets, when he was going through the gate." In reply Cumpston asked the questioner what he would do if "a man ran out in front of you." The questioner replied that he would have to hit him because he wouldn't have a chance to stop if he just ran out. Whereupon Cumpston replied, "There you have it. I guess the fence will stop him; if it doesn't he will end up in [a field]." Cagle testified without further explanation that midway in his reply Cumpston turned away and laughed.

Cumpston, called by Respondent, corroborated Cagle and identified the questioner as one Tex Frazier. Frazier was not called. In verifying the statement attributed to him Cumpston credibly explained that he was using an illustration to emphasize the fact that if someone did jump out in front of the driver's vehicle and he could not avoid hitting him there would, under such circumstances, be no fault. He testified further, however, that throughout his talk and after discussing this particular illustration that he placed much emphasis upon the need for all employees to drive with extreme care. There is nothing in Cagle's testimony to suggest that he did not.

C. *Analysis and conclusions*

The substance of the findings I have made herein presents for consideration an interrelated series of events that does credit to few, if any, of the parties or individuals involved. They present (1) an employer with a predilection for resisting the principles of collective bargaining, as well as the legitimate organizing efforts of its employees, (2) a labor organization whose representatives have resorted to a peculiarly immature approach to the organizing and bargaining processes and (3) a group of interested and partisan employees whose antics are worthy of the average school yard. Be this situation as it may, the rights of all of the approximately eleven hundred employees are concerned here and these are the rights which deserve the fullest protection afforded by the statute, regardless of the irritants and obstacles at hand. Accordingly, to the extent that employees are deprived of their rights, either actually or potentially, it is the deprivation and not the peculiar manner in which the rights may have been asserted that will be of prime importance in the several analyses which follow.

1. The refusal to bargain

No one contests the Union's status as representative of the employees in the Fire and Rescue Department and the Board's earlier findings in this respect in Case No. 16-RC-

3593 and the very wording of Sections 8(a)(5) and 9(a) of the Act clearly established Respondent's obligation to bargain collectively with such a certified representative. Despite this obligation explicitly imposed upon Respondent by the terms of the May 1964 certification it admittedly changed the working hours and conditions of its employees in the bargaining unit in a number of respects enumerated above, without any consultation whatever with the Union (*supra*, p. 16). This, as I ruled at the hearing upon Respondent's admission, constitutes a clear refusal to bargain in violation of Section 8(a)(5), and supporting citation of authority is unnecessary in this restatement of my finding and conclusion to the same effect. In so doing I find as a fact that Respondent has agreed on the record to be bound by my oral finding of a violation of Section 8(a)(5) and has agreed further that it would file no exceptions thereto.

2. The notice

Included in the notice posted by Respondent (*supra*, p. 15), and quite apart from its prohibition of union solicitation, is a statement that the Union's organizing campaign is a matter of serious concern to the Company. The notice states further

> It is, however, also a matter of serious concern to you and our sincere belief is that if this Union were to come into this Plant, it would not work to your benefit but to your serious harm.

This very phrase in an employee notice has frequently been reviewed by the Board and found to constitute unlawful interference, restraint and coercion.[45] Indeed a varient of the phase substituting for the last segment of the final sentence: "but *in the long run operate* to your serious

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[45] *Morris and Associates*, 138 NLRB 1160; *White Oak Acres, Inc.*, 134 NLRB 1145; *Owens-Corning Fiberglass Corp.*, 146 NLRB 1492.

harm.", has also been proscribed by the Board.[46] Upon such authority, therefore, I would conclude that so much of the posted notice as I have quoted above constitutes interference, restraint and coercion in violation of Section 8(a)(1) of the Act.

3. The Haley-McCarty discharges

The notice considered above also stated that

> (6) No person will be allowed to carry on Union organizing activities on the job. Anybody who does so and who thereby neglects his own work or interferes with the work of others will be subject to discharge.

Because this no-solicitation rule seeks to regulate employee activity only during working hours it is presumptively valid on its face.[47] If, therefore, it is illegal it is because it has been promulgated discriminatorily[48] or discriminatorily applied.[49] It was promulgated in November 1960, long before any of the incidents related herein occurred, including the May 1964 representation election conducted by the Board which resulted in the Union's certification. As a long term proposition this, it would seem, nullifies any suggestion that the four-year promulgation of the notice was discriminatory. I would accordingly conclude and find that absent evidence of discriminatory promulgation the no-solicitation provision of the notice, in and of itself, is not discriminatory. There remains however for

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[46] *Sagamore Shirt Co.*, 153 NLRB No. 27. The underlined words were added to the notice in that case.

[47] *The Rose Co.*, 154 NLRB No. 19; *Ward Manufacturing, Inc.*, 152 NLRB No. 127. *Walton Manufacturing Co.*, 126 NLRB 697, enfd. 289 F.2d 177 (C.A. 5). *Pepsi-Cola Bottlers of Miami, Inc.*, 155 NLRB No. 50.

[48] *Ward Manufacturing, Inc., supra.*

[49] *Sagamore Shirt Co., supra.*

determination whether this provision of the notice was discriminatorily applied.[50]

Employee Alfred McCarty, by his own admission (*supra*, p. 21), roamed about the plant soliciting employees during regular working hours on August 31. A reading of his testimony suggests that the only possible excuse he may have had was his belief that some of the employees were not at work when, in fact, they were; or that they were taking a periodic "smoke break." McCarty's soliciting activity was duly reported to Respondent's officials by those employees whom he solicited and who objected to his interference. And Respondent, upon receiving such information, enforced the rule by imposing the stated penalty of discharge.

Common sense and a normal interpretation of a usual plant rule prohibiting solicitation "on the job" or "during working hours" certainly does not permit of distinctions so finely drawn that workers being solicited must have tool in hand before the solicitation becomes improper. Nor do I believe that Respondent's supervisors should be held to this standard of vigilance in the enforcement of such a shop rule. McCarty was, by every reasonable criteria, soliciting on the job and upon the facts found it is clear that his was a discharge for cause. Nor does it become less because his activity was in behalf of the Union. The Act does not provide insulation in such circumstances.[51] Any union solicitation is union activity and indeed it is this particular type of union activity, solicitation on the job, that can and has been legitimately restricted.[52] It cannot be used here, therefore, as General Counsel urges, as the premise for excusing a violation of a plant rule. Finding as I do, that McCarty was

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[50] *Sagamore Shirt Co., supra.*

[51] Cf. *Southwire Co.*, 152; NLRB No. 158 *Tampa Coca-Cola Bottling Co.*, 130 NLRB 1505, 1509 and fn. 7; *Wix Corporation*, 132 NLRB 1059, 1078, and fn. 34.

[52] *Walton Manufacturing Company, supra.*

properly discharged for cause I would recommend that so much of the complaint alleging this to be a violation be dismissed.

The discharge of Joe Haley stands on no different footing (*supra*, 20). There is no question but that he did solicit an employee who was working on the job. Haley himself testified to this, seeking to excuse the incident by explaining that he mistook the time. Accepting as I do Haley's belief that he had misread the clock when he recruited the employee concerned, the simple fact is that he violated the posted rule. Accordingly, when this violation was reported to Respondent the posted penalty for violation—discharge—was properly imposed. Accordingly, and upon the same considerations as noted in McCarty's case above, I conclude and find that Haley too was discharged for cause and I shall recommend that so much of the complaint as alleges his discharge to be a violation of the Act be dismissed.

4. The first walkout

The facts clearly establish the Haley-McCarty discharges to be the direct cause of the several walkouts which followed (*supra*, p. 28). It is of no consequence, however, that the subject matter of the protest, the discharges, turn out to be for good cause and not violations of the Act, for the distinctions between a so-called economic and an unfair labor practice strike relate only to the aftermath; an unfair labor practice striker being entitled to reinstatement upon request under any circumstance and an economic striker being so entitled only if he has not been permanently replaced.[53] In no strike or walkout situation occurring herein has representation been made that any striker was permanently replaced. It is of no consequence, therefore, that the strike was of one variety rather than the other. I conclude and find, however, that the initial walkout on September 2 was in fact an economic strike.

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[53] *N.L.R.B.* v. *Mackey Radio and Telegraph Co.*, 304 U.S. 333, 343.

5. The segregation of returning strikers

Respondent's reassignment of returning JEFM shop strikers to two specific crews (*supra*, p. 37) is claimed to be unlawful as a discriminatory reprisal for their walking off the job. I have credited Director of Aircraft Maintenance Hill's explanation for this reassignment as being one dictated by the emergency situation created in the plant by the walkout, and as an assurance, of sorts, that the production of the shop would not again be completely disrupted in case another walkout by these people occurred.

In *N.L.R.B.* v. *John Brown*, 380 U.S. 278, the United States Supreme Court, holding to be lawful a lockout in response to a whipsaw strike, where operations continued with temporary help, stated (at 283):

> In the absence of proof of unlawful motivation, there are many economic weapons which an employer may use that either interfere in some measure with concerted employee activities, or which are in some degree discriminatory and discourage union membership, and yet the use of such economic weapons does not constitute conduct that is within the prohibition of either Section 8(a)(1) or (3). See, e.g., *Labor Board* v. *Mackey Radio and Telegraph Co., supra; Labor Board* v. *Dalton Brick and Tile Co.*, 301 F. 2d 886, 896. Even the Board concedes that an employer may legitimately blunt the effectiveness of an anticipated strike by stockpiling inventories, readjusting contract schedules, or transferring work from one plant to another, even if he thereby makes himself "virtually strike proof." As a general matter he may completely liquidate his business without violating either Section 8(a(1) or (3), whatever the impact of his action on concerted employee activities. *Textile Workers* v. *Darlington Manufacturing Co.*, 380 U.S. 253.

If then an actual exclusion of employees from their work can thus be lawfully effected under certain conditions specified by the Court, *a fortiori*, the assignment of employees to specific work stations for the purpose of safeguarding against future strike action would be equally permissive. Thus as the Supreme Court stated on the same day in another case involving the legitimacy of a lockout, *American Shipping Building Co.* v. *N.L.R.B.*, 380 U.S. 300 at 311.

> . . . We have consistently construed [Section 8(a)(3)] to leave unscathed a wide range of employer actions taken to serve legitimate business interest in some significant fashion, even though the act committed may tend to discourage union membership.

Upon the foregoing authority, therefore, I would conclude and find that the reassignment of employees to new work stations upon their return from their strike was a safeguard by which "the employer may legitimately blunt the effectiveness of an anticipated strike," and was neither a discrimination in violation of Section 8(a)(3), nor interference, restraint and coercion in violation of Section 8(a)(1). I will accordingly recommend that so much of the complaint that alleges such a violation be dismissed.

6. The September 4 conditional offer to return

As set forth in detail earlier in this decision (*supra*, p. 37-39) the treatment of the fifteen strikers upon their return from their one day protest of Haley's and McCarty's discharge sparked a series of walkouts. The JEFM shop employees responded in greater numbers, 26, to be exact, and at the end of the day they agreed, it will be recalled, to return to work on the following morning, to find when they appeared that the same rearranged assignments were to be observed. When asked if they were ready to return to work their leader stated that they were giving the Respondent until the following Tuesday (September 8) to rearrange the workplace assignments to their original form. Respondent

interpreted this ultimatum to be a condition upon the employees' return and refused to let them work. It is this refusal on the morning of September 4 that General Counsel alleges to be a discriminatory lockout violation Section 8(a)(3).

It is well settled, of course, that an employer need only reinstate strikers upon their unconditional offer to return to work.[54] It is critical to the issue presented, therefore, to determine if the strikers who returned on September 4 and were refused had placed a condition upon their willingness to work.

The Board has recently considered facts similar to this in *Northeast Products Co., Inc.*, 147 NLRB 675, holding that where strikers were unwilling to work on existing terms but only upon proposed new terms the employer "was reasonably justified in regarding the strike as not yet over." Relating this case to the instant one the assertion of Employee Ringgold (*supra*, p. 37-39), speaking for the men, "We will give you till 7:45 Tuesday to put us back where we were before," is on no different footing. Upon it I conclude and find that Respondent's Hill was "reasonably justified," as was the employer in the cited case, "in regarding the strike as not yet over." Accordingly, I would recommend that so much of the complaint as alleges the employees' September 4 absence from work as a lockout in violation of Section 8(a)(3) and (1) be dismissed.

7. The unlawful lockout of September 8

The continuing walkout on September 4, augmented by at least 28 more employees (*supra*, p. 33 and fn. 17) was interrupted by still another offer to return—this return set for the morning of September 8. By this offer the Union, speaking for the strikers, "respectfully demanding that the

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[54] *Deaton Truck Line, Inc.*, 152 NLRB No. 137, fn. 10; *Park Edge Sheridan Meats, Inc.*, 139 NLRB 748, enfd. 323 F.2d 956 (C.A. 2).

Company . . . allow all concerned to return to their jobs without any more retaliatory measures being taken against them because of their concerted activities." This request to return, unlike the previous one, had no condition attached to it. By it the men were ready, willing and able to work, expecting that when they did so they would not be punished. This is not a condition; it is simply an expression of their right not to be hurt. When the men employed at the base shop appeared for work on the morning of September 8, however, they were refused, Respondent insisting it had already made its emergency arrangements at the base shop for that day's work in anticipation of a continuing strike. When the returning strikers employed in the JEFM shop learned of the treatment of the base shop strikers this group again walked off their jobs in protest.

Here we have two separate situations. One group allegedly locked-out—the base shop employees. Another group who never waited to learn if they had work, but who left in protest—the JEFM employees. The former has been deprived of work, the latter has not—and the distinction is critical in remedying any loss of pay that may have occurred.

Accepting on its face Respondent's reasons for curtailing base shop work on the morning of September 8 as being prompted by operational necessity it remains to be seen if this justifies locking out the base shop people for that day; remembering of course, that on September 4, immediately before the intervening weekend, the striking employees made what I have already found to be an unconditional offer to be at work on the 8th.

Preliminary to any consideration of a lockout as a Section 8(a)(3) violation is the assessment of the employer's motive. Cf. *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221; *American Ship Building Co.* v. *N.L.R.B.*, *supra.* Respondent's motives are manifest. Thus it has already been found

that Respondent has an admitted *the* predisposition to ignore its bargaining obligations with the Union (*supra,* p. 66), and in addition, it has made repeated inquiries of its employees as to the Union, its campaign, and their position with respect to it, it has singled out its leaders for criticism, has told other employees that the Union would jeopardize their jobs (*supra,* p. 18, all of which I conclude and find to be unlawful interference, restraint and coercion in violation of Section 8(a)(1).[55] Added to this Respondent has posted a notice, the essence of which I have already found to constitute a threat (*supra,* p. 66) and which states in paragraph 2 that "it is our positive intention to oppose this Union and by every proper means to prevent it from getting in here," and, as the recitation of all the facts herein disclosed, it has carried on throughout the entire period covered by this Decision its own harassment of the Union which I will consider in detail as we continue in this Decision. Under all the circumstances enumerated above, therefore, and upon the facts found herein, I can and do infer from them Respondent's antipathy to the Union. Being so motivated and with three working days in which to prepare (September 5, 6 and 7) I would conclude and find that Respondent's failure to accept the strikers' September 4 unconditional offer to return was in fact rejected because of the Respondent's antipathy to the Union and that the alleged unpreparedness of the base shop on September 8 when the men appeared there for work was but a contrived excuse to put them off for another day. With three days in which to adjust itself it cannot be heard to say that the men's arrival on the morning of the eighth caught them unprepared and thereby justified depriving these men of work until the following day. I find Respondent's excuse to be but a pretext for its desire to thwart or punish its employees for engaging in a legitimate concerted activity. I accordingly conclude and find that Respondent's one day lockout of the base shop

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[55] Cf. *Fontainbleu Hotel Corp.,* 131 NLRB 14, fn. 2.

employees whose names are enumerated in fn. 17 *supra,* as discriminatory and a violation of Section 8(a)(3) and (1) of the Act.

I am conscious, to be sure, of a distinction that I have made herein in the application of the law governing an employer's resort to self help. Earlier I justified a reassignment of work stations as a legitimate anticipation of future strike activity, citing recent Supreme Court decisions. Here I have found a subsequent lockout to be unlawful. This, it would seem, is the element of balance suggested by the Court in *John Brown* v. *N.L.R.B., supra.* While I have not overlooked the likelihood of a continuing anti-union motivation on Respondent's part I would direct my conclusions to the consequences rather than to the acts themselves. Thus the reassignment of work stations deemed to be justified was, at most, an inconvenience to employees. The lockout above, on the contrary, was not shown to be justified but to be motivated by a spirit of reprisal. This constituted, not a mere inconvenience in work location, but *an* computable loss of pay.

Because there is no evidence that the JEFM employees were deprived of work on September 8 and upon the evidence that they actively refrained from work in protest of the base shop lockout I specifically conclude and find that no discrimination was visited upon this group on this occasion. Indeed Union Representative Christian's telegram dated September 8 establishes this very fact, specifically identifying two distinct groups as "the groups that were locked out and the group that walked out protesting . . ."

I accordingly recommend that so much of the complaint as alleges the absence from work of the JEFM strikers on September 8 to be a violation of Section 8(a)(1) and (3) be dismissed.

8. The Firemen's walkout and lockout

The walkout of the firemen on September 14 is set forth in the findings above (*supra,* p. 36) and appears to have been prompted by Respondent's unwillingness to engage in an immediate, on-the-spot settlement of a grievance of undetermined merit. Regardless of the clouded circumstances and the questionable wisdom which prompted the men to walk out there is nothing in the record to suggest it was not a protected activity. And because all were subsequently returned to their job it is of no consequence that this was or was not an unfair labor practice strike. Actually it is the circumstance of their return that is at issue.

Detailed in the facts (*supra,* p. 38) is the Union's telegram of September 15 "advising" Respondent that the employee members of the Union would report to work on the following day, September 16. Respondent rejected this offer, calling it a conditional one which it was not obliged to accept. The portion of the Union's offer claimed to be a condition was the following sentence in the telegram:

> Be further advised that they are interested in returning to their jobs and remaining on their jobs *as long as the Company doesn't create new instances that would cause another disturbance.* (Emphasis supplied)

This is the Respondent's second such objection to an employee offer to return (*supra,* p. 34). A reading of this one makes it abundantly clear that the employees were attaching no strings whatever to their return. What they did was to reserve their rights, for the future and *after* they returned to work, not to be hurt. I would conclude and find that the employees in the fire fighting unit accordingly offered unconditionally to return to work on September 16, and indeed seven actually appeared for work at Perry Field and were refused. When thereafter Respondent, by its president's letter, refused to accept this unconditioned offer it

effectively locked out the employees. The employees remained in this status until September 17 when they adopted language acceptable to Respondent. During this intervening time, September 16 and 17, based upon my earlier conclusions respecting Respondent's anti-union motivation (*supra*, p. 73, 74) I conclude and find that the men were excluded from their jobs by Respondent for retaliatory reasons in violation of Section 8(a)(3) and (1) of the Act.[56]

9. The buttons and badges

The ludicrous spectacle of Union adherents and Respondent's representatives seeking to outdo each other in a childish display of buttons and badges of all sizes and descriptions nonetheless presents a serious legal issue quite apart from its comic aspects (*supra*, p. 42).

Upon the conclusion of General Counsel's presentation of evidence dealing with both the button wearing and the subsequent disciplinary terminations I denied Respondent's motion to dismiss so much of the complaint as alleged discharges for such a reason to be a discrimination in violation of the Act. Upon hearing evidence adduced by Respondent in support of its reason for the rule and the terminations I reaffirm my ruling and find a violation of Section 8(a)(3) and (1) of the Act.

It is well settled that the promulgation of a rule prohibiting the wearing of Union insignia constitutes a violation of Section 8(a)(1) in the absence of evidence of "special circumstances" showing that such a rule is necessary to maintain production and discipline.[57] It would follow,

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[56] In this respect it is to be noted that the employees at Perry Field returned on September 17, and all others on September 18.

[57] *Floridan Hotel of Tampa, Inc.*, 137 NLRB 1484; *Fabri-Tek Inc.*, 148 NLRB No. 156; *Parker Seal Co.*, 149 NLRB No. 73; *Harrah's Club*, 150 NLRB No. 169; *The Annin Co., Division of Worthington Corp.*, 151 NLRB No. 147.

as a logical consequence, therefore, that a discharge pursuant to such a rule would constitute discrimination in violation of Section 8(a)(3).

It is Respondent's contention, of course, that "special circumstances" do justify its conduct here, referring to the disruptive influence upon both production and the harmony in the plant, and to the danger to the jet engines inherent in the presence of "foreign objects" on the persons of those working on and near such engines.

With respect to its claim that the wearing of insignia creates a disruptive atmosphere it would seem that Respondent's own actions defeat its position. Thus, in the first place, its rule restricts the employees to the wearing of *one* button of their choice. It is difficult to perceive how if each partisan union member were to wear one button the production would be less disrupted and the plant harmony less disturbed than if they each wore more than one. It would seem more reasonable to expect that production and harmony would be effected, if at all, by buttons or no buttons; but certainly not on a quan*tative* basis. Moreover, if this objective was seriously being sought by Respondent it is equally difficult to understand how it could be encouraged, or was intended to be encouraged, by Respondent's own officials, including Assistant General Manager Hood, and those employees who opposed the Union, each wearing buttons of like dimensions expressing opposition to the Union. Indeed if dissension had not been generated by the appearance of union buttons I can conjure no more effective way to generate it than by Hood's appearance wearing an opposition button. Furthermore, it seems obvious that Respondent's fears for production and disharmony were of recent origin. Thus, Employee Knowlton credibly testified that prior to August 28 many of the employees were wearing more than one union button in the presence of supervisors and were never noticed or reprimanded for it. Nor was it thereafter mentioned to them as a deterrent to either pro-

duction, harmony, or safety, for in a notice stipulated by the parties to have been posted as late as September 16, 1964 employees were exhorted to observe the "no smoking" regulations and to avoid temporary absences from their work stations, but the wearing of buttons was *not mentioned, albeit* Respondent subsequently claimed it to be a deterrent to production as well as a safety hazard.

Upon the considerations discussed above and in view of Respondent's expressed antipathy to the Union I reject as implausible its claim that the wearing of Union buttons was disruptive of plant production and conducive of disharmony. On the contrary I find that these stated objections to the Union member's activities constituted a pretext to mask Respondent's effort to curtail the union organizing effort then in progress.

Nor do I accept wholeheartedly Respondent's reliance upon the foreign object damage safety program as the other basis for its promugation of the button rule. For there appeared to be too many exceptions to the regular observance of these safety precautions to make promulgation of the rule a matter of prime consideration in that respect. Thus it appears that all civilian as well as military personnel, including Assistant Manager Hood, wore or were permitted to wear plastic name tags affixed to their jackets with a safety clip or pin of a construction identical to the badge worn by Hood and other Respondent officials, and to the proscribed badges worn by Union adherents. Similarly it was established at the hearing that employees working on jet engines habitually carried pencils, both loose and clipped, steel rules without clips, cigarettes and other items in their breast pockets with the knowledge and without the objection of management and supervisors. And finally there is credible testimony (Knowlton) that employees never heard of the safety hazard aspects of the button wearing until the notice was posted restricting, not the wearing of buttons, but the number of buttons that might be worn.

Upon the foregoing, and without in any way minimizing the need and justification for a rigidly enforced safety program directed to the elimination of foreign object damage, I conclude and find that Respondent's restriction of badge wearing for that stated reason was also but a pretext to curtail union activity of its employees.

Most persuasive of Respondent's intent in this matter of badge restrictions and the safety reasons assigned by it were two unrelated situations. Employee Robert E. Summers whose duties were to run a lawnmower credibly testified that although he was terminated on October 23 for wearing too many buttons he never worked anywhere near an aircraft or a jet engine. Similarly, there were instances of employees, including Knowlton, who were instructed to remove Union legends taped to their jackets under pain of discharge. It challenges credulity to equate the work activities of a ground keeper or a taped sign on a jacket with the elimination of foreign object damage.

Upon all of the foregoing considerations, therefore, I conclude and find that Respondent has not established circumstances of a variety that would except it from the application of well established rule of law which permits the wearing of Union insignia.[58] I therefore conclude and find that Respondent has thereby interfered with, restrained and coerced its employees in violation of Section 8(a)(1), and insofar as it terminated certain of its employees whose names and the dates of their termination appear above (*supra*, pp. 42, 43, 44) for refusing to comply with the rule it thereby discriminated against them in violation of Section 8(a)(3).

10. The employee petition

It is counsel for the General Counsel's contention, as stated at the hearing, that the petition signed by a majority of Respondent's employees between October 1964 and Janu-

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[58] Cf. *Standard Fittings Co.*, 133 NLRB 928.

ary 8, 1965 and sent to the Board's Regional Director "was encouraged, sponsored and circulated by supervisors and was an anti-union petition and therefore it interfered with Section 7 rights."

It has been established by credible testimony that at least two supervisors signed the petition, and that one of them Huston, actually solicited signatures (*supra*, pp. 47, 48). So, to that extent General Counsel accurately states the participation of Respondent's supervisors in the effort.

What remains to be considered, however, is whether this petition was, in fact, an anti-union petition and whether its sponsorship by supervisors did deprive employees of Section 7 rights.

It is appropriate to inquire, it seems, what Section 7 rights did the petition, on its face, interfere with. All that the petition, as presented to the Regional Director, stated was that those who signed it were, to paraphrase its language, making known their request that the question of a union or no union be brought before them in an election. This, it appears, was nothing more on the part of the employees than an expression of their right guaranteed by Section 7 to determine for themselves whether or not they are to be represented for collective bargaining purposes or other mutual aid or protection. Thus on its face the petition appears to be nothing more than a mass effort of the employees to secure for themselves what the Act provides for them through Section 9(c), namely, an election.

The vice in this petition must lie, if at all, in the fact that supervisors as well as rank-and-file employees desired a Section 9(c) election, or in the alternative, that supervisors were instrumental in urging rank-and-file employees to request one. That supervisors had merely joined in such a petition by adding their signatures seems hardly grievous enough to invalidate the document. For if this were so it could bring into question those situations where employees'

supervisory status might be in doubt. Thus if their names were included in a Section 9(c) petition this might well be the cause of invalidating the petition and the otherwise valid representation proceeding flowing from it. This would be a ludicrous result and I reject any suggestion that the presence of a supervisor's signature on an otherwise valid election petition in and of itself invalidates it.

It remains to be considered, therefore, whether *solicitation* by a supervisor of signatures on a petition for an election is actually deprivation of employee rights.

This Respondent has been found by me to have harbored animus against the Union and has engaged in a variety of unfair labor practices designed to thwart the Union's organization efforts. Having thus given unlawful expression to the animus it bears, in an effort to curtail the Union, to now permit it to urge through its supervisors a choice among its employees would simply permit the employer to reap the harvest of its earlier efforts. It has long been settled that an employer may not be permitted to enjoy the fruits of his own unfair labor practices[59] and that is precisely what would occur here for an election to be held when so requested. To the extent, therefore, that Respondent's supervisors sought such a result it thereby deprived all of the employees of an election free from the debilitating effects of the Respondent's unlawful conduct. Under these circumstances, therefore, I would find that the supervisory sponsorship of the otherwise legitimate request for an election constitutes interference with the employees' Section 7 rights in violation of Section 8(a)(1).

11. The November JEFM layoffs

It is General Counsel's contention that the reduction in force resulting from the change in inspection operations (*supra*, pp. 51-54) constituted discrimination for two reasons:

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[59] *Franks Brothers Co.* v. *N.L.R.B.*, 321 U.S. 702.

That the time was discriminatorily selected, and that the employees were likewise discriminatorily selected.

There can be no question but that a reduction in force was necessary in the Fall of 1964. Documentary evidence in the form of Air Force directives and correspondence, as well as undisputed testimony, detail the technical circumstances which dictated curtailing the work force of the JEFM shop by sixteen men, eight of whom were actually eliminated by attrition. A review of the chronology of this technical decision and the events leading up to it (*supra*, p. 51) indicates that although the likelihood of such a change was known throughout the Summer it was not until September 2 that accurate information on the nature and extent of the change was available to Respondent in the form of the "work cards" received from Air Force Headquarters. The six weeks which followed were devoted to study of the new operations, and by October 12 the need for curtailment of work force became apparent. Within two days the extent of the reduction had been determined and the date, October 23, was set for implementation. Meanwhile the Air Force was requested by Respondent to find other work for those affected and replied a week later that it would be unable to assist. On November 6 the reductions became effective.

There is certainly no appearance of precipitate action or panic in the plan to reduce the work force and the very chronology noted above is sufficient to establish this fact. It had to be done, everyone agrees. General Counsel has suggested no reason why an earlier or a later date would be less discriminatory, and indeed had Respondent moved with any greater dispatch the employees reduced by attrition would most certainly have been included among those terminated in fact. And had there thus been greater dispatch the terminal date would have more closely coincided with the several walkouts which occurred in September (*Supra*, p. 28) and with the badge dispute (*supra*, pp. 42, 43) which occurred in October. It could then have been argued

more effectively that a greater number were being terminated than there would have been had attrition been permitted to set in, and that the layoff was being perpetrated in the throes of a labor dispute. As matters stand I am satisfied, and I conclude and find, that the date for the reduction in force was not selected for discriminatory reasons and I would recommend that so much of the complaint as alleges the selection of the date to constitute a violation of the Act be dismissed.

The selection of individuals for layoff stands on less firm ground, and for the reasons which follow I am disposed to conclude that it was done for discriminatory reasons. An analysis of the facts relating to this selection (*supra,* pp. 51-54) discloses that each of the eight who were selected had been designated by the Union as a shop steward, and each was known to be such by Respondent's supervisory personnel. Moreover, the eight selected, based upon all the facts found herein, were known to be the most active in the Union's organizing campaign, quite apart from their designation as stewards. They all participated in the several JEFM shop walkouts; were discriminatorily locked out on September 8, and excepting only Lankard, were the employees grouped together in the same working area (*supra,* pp. 28, 29) in an effort to soften the blow of a future walkout. Thus there is no question that the leaders were the ones selected.

Had the leaders been, in fact, *objectively* selected for layoff certainly it could not be said that their prominence and activity had earned for them some special immunity.[60] But the claim of objectivity is simply not supportable. I have detailed above (*supra,* pp. 51-54) the significant facts relating to each employee selected. These facts disclose that on the basis of allegedly objective criteria many employees with little or no seniority were retained at the expense of

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[60] Cf. *Southwire Co.,* 152 NLRB No. 158.

men like Greer and Scaia, for example, each of whom had a maximum of five seniority points. Similarly, over the entire gamut of so-called objective criteria the individuals selected were rated sufficiently low to bracket them in the lowest segment. In view of the circumstances under which these criteria were applied and the ratings made, the objectivity of the process is certainly open to question. Thus in a continuing atmosphere of tension between the management officials who made the ratings, particularly Sprayberry and Lolmaugh, on the one hand, and the union leaders being rated, on the other, and in the light of Respondent's animus towards the Union which I have already found to exist (*supra*), it cannot be seriously claimed that the ratings of these leaders are objective when made on such items as Job Attitude, Attitude Towards Supervision, Acceptance of Rules and Regulations, and Harmony with Coworkers. These are the areas of human relations in which effective union leadership is most vigorous. Cerainly then to test these leaders by standards and values applied by the other party to a running dispute would be comparable in the area of baseball, as an example, to the selection of an umpire from among the players on one of the contesting teams. Respondent's repeated assertion that the categories of evaluation are in themselves objective, however sincerely made, is completely at variance with basic human nature. The categories referred to are those which cannot logically, in the charged atmosphere of the dispute at hand, be the least bit objective. Thus it is reasonable to expect that a partisan union leader in an existing labor dispute would not be found harmonious among all of the workers, nor would he reasonably be expected to docilely accept all of the rules and regulations, including those whose application he was protesting. Nor would it reasonably be expected that he would be rated too highly in the area of attitude towards supervision. In sum, I am not disposed, under the circumstances present, to view as objective the rating applied for the selection of the employees to be laid off.

Assuming, contrary to the facts found, that these ratings were objective and that the employees were objectively rated, it still appears that even then the ranking established for each did not finally determine who was to be laid off. On p. 86, *supra*, I have set forth the status of the thirteen lowest in rank. While it is contended generally that those eight who ranked lowest would be laid off this admittedly did not happen. Lankard and Payne ranking tenth and twelfth from the lowest were laid off; whereas Edwards, Ringgold and Peckham, ranking first, fourth, and seventh, were retained. These very exceptions to the stated rule simply adds further doubt to the objectivity of the entire process. Upon the foregoing analysis and a review of all the facts found I am persuaded that the eight JEFM employees: Anson, Brockway, Greer, Kuhlmeier, Knowlton, Lankard, Payne, and Scaia, were selected for layoff on November 6, 1964, not for reason of their ranking in an evaluation which I do not find to be objective, but because of their prominence and their active participation in the affairs of the Union. Nor am I disturbed that some of the employees may well have displayed deficiencies in one or other of the critical areas of evaluation. I am persuaded that Respondent's reliance upon these deficiencies was but a pretext to mask its true reason which I find and conclude to be a purpose of eliminating from its employ the most active Union leaders. I accordingly conclude and find that the eight JEFM shop employees named above were discriminatorily selected for the November 6 layoff in violation of Section 8(a)(3) and (1) of the Act.

12. Chodrick's discriminatory layoff

Everything that has been said with respect to the mechanics of the JEFM shop reduction in force may be repeated with equal force in considering the reduction which occurred among the firemen as a result of the closing of Perry Field (*supra*, p. 57). There, as in the JEFM shop, a rating chart was prepared, employees were rated during the

same period of union activity on the basis of the same allegedly objective criteria, and the lowest ranking ratees were selected for layoff.

In the light of the selection of eight Union stewards for layoff at the JEFM shop it is not at all surprising that Chodrick, the avowed leader of the unionized firemen, was ranked third lowest in a group of 58. That Chodrick, a fire fighting employee with four years seniority and a total of eight years experience in his duties, should receive only seventeen out of a possible forty-five points raises doubts as to the objective application of the criteria. Even more doubts arise when it can be shown from the rating chart that eight employees with a year or less seniority received ratings of 25 or higher.

All that has been said with respect to the character of the criteria used in the JEFM reduction applies with equal relevance here and need hardly be repeated. Suffice it to say that such shortcomings as Chodrick may have had were not, in my opinion, the true reason for his low ranking and his selection for layoff. On the contrary they were but a pretext to conceal Respondent's true purpose, displayed in so many instances herein, to eliminate an active Union protagonist. I accordingly conclude and find that Chodrick's selection for layoff on November 25, was a discrimination against him in violation of Section 8(a)(3) and (1) of the Act.

13. The provoking of pickets

A reading of the account of the meeting called to brief employees on conduct to be observed during the January 1965 strike (*supra,* p. 58) discloses nothing more startling than a questioner, either seriously or in jest, asking what would happen if a picket walked in front of his moving car. Everything in the facts I have found above suggests merely that he was told by Supervisor Crumptson to be careful. There is nothing in the record to suggest that anyone de-

liberately or otherwise suggested that pickets be run down by cars. I accordingly recommend that so much of the complaint as alleges such conduct to be a violation of the Act be dismissed for lack of credible, relevant evidence.

14. Summary

By way of recapitulation I have concluded and found that Respondent, by its own admission, has refused to bargain with the Union as the certified representative of the employees in the Fire and Rescue Department in violation of Section 8(a)(5). It has interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) by (1) posting a notice to its employees, the substance of the offending portion (Paragraph 1) being a threat of the consequence of unionization, (2) by the interrogation by and threatening statements of Respondent's officials Masemore and Sprayberry, (3) by the restrictions placed upon its employees in the wearing of Union insignia, and (4) by solicitation of its supervisors of employee signatures upon a petition for an election. Respondent has discriminated against its employees in violation of Section 8(a)(3) by (1) locking out its base shop employees on September 8, (2) by locking out its striking firemen on September 14-16, (3) by terminating employees who refused to comply with its directive restricting the wearing of union badges and insignia, and (4) by its selection for termination of active union leaders, exclusively, in the execution of a reduction in force occasioned by a changed method of operation in JEFM shop and by the deactivation of Perry Field.

In addition to the foregoing findings and conclusions which support certain allegations in the complaint I have also recommended, upon the facts found, that the complaint be dismissed in certain respects. Thus I do not find that any inquiry of Knowlton by Hood as to whether he was "one of those who walked out" was unlawful in the context of a conversation between the two of them at a union-management negotiating session. Nor have I made any finding with

respect to the unlawful character of a warning letter given to Employee Chodrick (*supra*, p. 17) or of the giving of tests to employees in the summer of 1964, the record being unclear as to the incidents and, the Respondent having been found to have otherwise violated Section 8(a)(1), the subject matter may be deemed surplusage.[61]

Other incidents which I have rejected as violation of Section 8(a)(1) are (1) the reassignment of employee work stations in the JEFM shop, and (2) the Respondent's alleged tacit suggestion through Supervisor Cumpston's remarks that pickets be run down by autos.

In certain respects I find that Respondent's conduct did not constitute discrimination in violation of Section 8(a)(3) and thus have recommended that the complaint be dismissed in such respects. Thus (1) Employees Haley and McCarty were properly discharged for soliciting union membership either on their own working time or on that of the employees whom they solicited, (2) Respondent properly reassigned the JEFM employees to work stations on September 2, (3) it was not obliged to reinstate the same employees on September 4 in view of their conditioned offer to return, and (4) the JEFM strikers were not locked out on the morning of September 8, but continued their strike, it never having been established that they were refused work by Respondent.

## V. The effect of the unfair labor practices upon commerce

The activities of the Respondent set forth in section IV, above, occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing the free flow thereof.

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[61] *Vacuum Platers, Inc.*, 154 NLRB No. 48.

## VI. The remedy

Having found that Respondent has engaged in unfair labor practices I shall recommend that it cease and desist therefrom and, because of the gravity of its conduct I shall also recommend that it cease and desist from infringing in any other manner upon the rights of employees guaranteed by Section 7 of the Act.[62]

Affirmatively I shall recommend that the nine employees whom it discriminatorily selected for layoff as part of a reduction in force be reinstated to their fomer or substantially equivalent positions, if this has not already been done, without prejudice to seniority or any other rights and privileges, and that they be made whole for any loss of earnings suffered by them because of Respondent's discrimination against them, with backpay computed by access to the Company's books, records and accounts, and in the customary manner,[63] with interest added thereto at the rate of 6 percent per annum.[64] I shall further recommend that the base shop employees who were locked out on September 8, whose names appear on p. 32, fn. 17, *supra,* the firemen who were locked out on September 14-16 and 17, whose names appear on p. 41, *supra,* and the employees discriminatorily laid off on October 21, 22 and 23, whose names appear on p. 48, *supra,* all be made whole in the manner described above.

There appears in the record and upon the credited testimony of Respondent's president, Truman Miller, the likelihood that on two occasions civilian fire fighting personnel were replaced by Air Force military personnel. Thus, on September 16 Union Representative Christian complained by telegram to the Board's Regional Director that the Air Force

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[62] *N.L.R.B.* v. *Express Publishing Co.,* 312 U.S. 426, 433.

[63] *F. W. Woolworth Co.,* 90 NLRB 289.

[64] *Isis Plumbing & Heating Co.,* 138 NLRB 716.

personnel were replacing fire fighting employees whom I have found to have been locked out. Similarly, President Miller testified that during the economic strike in progress during pendency of the hearing Air Force personnel were used as replacements.

The United States Supreme Court has specifically precluded the use of the Board's remedial facilities for redressing public injuries of the type suggested by the evidence herein. *Republic Steel Corp.* v. *N.L.R.B.*, 311 U.S. 7. It would seem appropriate, however, and I recommend, that the proper authorities of both the Air Force and the Department of Defense be advised that in the respects noted herein military replacements have been availed of, however unwittingly, for the purpose of effectuating unlawful conduct. For, to the extent that such replacements relieved Respondent of the need to use the employees whom it locked out then to that extent these replacements contributed to the effectiveness of the lockout.

## RECOMMENDED ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I recommend[65] that Serv-Air, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Unlawfully interrogating employees concerning their or their fellow employees' union membership, activities or desires.

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[65] In the event that this Recommended Order be adopted by the Board, the word "RECOMMENDED" shall be deleted from its caption and wherever else it thereafter appears; and for the word "I RECOMMEND" there shall be substituted "THE NATIONAL LABOR RELATIONS BOARD HEREBY ORDERS."

(b) Threatening its employees with discharge or other reprisal for engaging in union activities or for supporting the Union.

(c) Posting at its plant a notice informing employees that if the Union's organizational efforts succeeded "it would not work to your benefit but to your serious harm."

(d) Restricting its employees in the wearing of Union insignia.

(e) Soliciting the signatures of its employees to secure a Board election.

(f) Discharging and otherwise discriminating against its employees in respect to hire and tenure by layoffs in reprisal for the wearing of Union insignia, by selection of them for economic termination because of their active union leadership and by locking them out because of their participation in protected concerted activity.

(g) Refusing to bargain collectively with Smoke-Eaters Lodge No. 898, International Association of Machinists, AFL-CIO, as the exclusive representative of employees in the following unit found to be appropriate for the purpose of collective bargaining:

> All employees of Serv-Air, Inc. in the Fire and Rescue Department of the Base Operations and Maintenance Division, Enid, Okla., excluding office clerical employees, fire chief, platoon chiefs, guards, watchmen and supervisors as defined in the Act.

(h) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act.

(a) Offer immediate and full reinstatement, if this has not already been done, to

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| Thomas E. Anson | Robert J. Kuhlmeier |
| Franklin Brockway | Victor H. Lankard |
| Ressie Chodrick | Jesse E. Payne |
| Eldon G. Greer | Thomas D. Scaia |
| Robert L. Knowlton | |

to their former or substantially equivalent positions in the manner set forth in the section of the Trial Examiner's Decision entitled "The Remedy."

(b) Make whole employees whom it has unlawfully locked out or laid off for any loss of pay they may have suffered by reason of Respondent's discrimination against them in the manner set forth in the section of the Trial Examiner's Decision entitled "The Remedy."

(c) Upon request, bargain collectively with the above-named labor organization as the exclusive representative of all Respondent's employees in the unit found appropriate and, if an understanding is reached, embody such understanding in a signed agreement.

(d) Post at its Vance Air Force Base and Kegelman Field operations copies of the notice attached hereto as "Appendix."[66] Copies of said notice to be furnished by the Regional Director for the Sixteenth Region shall after being duly signed by the Respondent, be posted immediately upon receipt thereof, in conspicuous places, including places where notices to employees are customarily

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[66] In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

posted, and be maintained by it for a period of 60 consecutive days thereafter. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify said Regional Director in writing within 20 days from the receipt of this Decision what steps the Respondent has taken to comply therewith.[67]

Dated at Washington, D. C.

(signed) Thomas F. Maher

Thomas F. Maher
Trial Examiner

[67] In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing within 10 days from the date of this Order, what steps the Respondent has taken to comply therewith."

[APPENDIX]

# NOTICE TO ALL EMPLOYEES

## PURSUANT TO

THE RECOMMENDED ORDER OF A TRIAL EXAMINER OF THE

## NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

## NATIONAL LABOR RELATIONS ACT

we hereby notify our employees that:

WE WILL NOT unlawfully interrogate our employees concerning their or their fellow employees' union membership, activities, or desires.

WE WILL NOT threaten our employees with discharge or other reprisal for engaging in union activities or for supporting SMOKE-EATERS LODGE NO. 898, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, or any other labor organization.

WE WILL NOT post in our plant notices informing our employees that if the aforesaid Union's organizational efforts succeed "it would not work to your benefit but to your serious harm."

WE WILL NOT restrict our employees in the wearing of Union insignia NOR WILL WE discharge or otherwise discriminate against them for wearing said insignia.

WE WILL NOT discharge, layoff unlawfully lockout or otherwise discriminate against our employees in respect to hire or tenure because they are leaders in the aforesaid Union or have participated in concerted activities protected by Section 7 of the National Labor Relations Act.

WE WILL, upon request, bargain with the aforesaid Union as the exclusive representative of all our employees in the appropriate unit with respect to rates of pay, wages, hours of employment, and if an understanding is reached, embody such understanding in a signed agreement. The appropriate unit is:

All employees in the Fire and Rescue Department of the Base Operations and Maintenance Division, Enid, Okla., excluding office clerical employees, fire chief, platoon chiefs, guards, watchmen and supervisors as defined in the Act.

WE offer immediate and full reinstatement to their former or substantially equivalent positions to

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|---|---|
| Thomas E. Anson | Robert J. Kuhlmeier |
| Franklin Brockway | Victor H. Lankard |
| Ressie Chodrick | Jesse E. Payne |
| Eldon G. Greer | Thomas D. Scaia |
| Robert L. Knowlton | |

WE WILL notify the above-named if presently serving in the Armed Forces of the United States, of their right to full reinstatement upon application in accordance with Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

WE WILL make whole for any loss of pay they may have suffered those employees whom we unlawfully laid off, discharged or locked out, in the manner set forth in the section of the Trial Examiner's Decision entitled "The Remedy."

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

All of our employees are free to become or refrain from becoming members of the above-named union, or any other labor organization.

SERV-AIR, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 6th Floor Meacham Building, 110 West Fifth Street, Forth Worth, Texas 76102 (Tel. No. 335-4211 Ext. 2145).

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# In the Supreme Court of the United States

OCTOBER TERM, 1968

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No. 276

SERV-AIR, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. i-xiii) is not yet reported. The Board's decision and order (R. 1472-1605)[1] are reported at 161 NLRB 382.

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[1] "R." refers to the printed "Appendix" filed in the court of appeals. The Board's decision and order, including the Trial Examiner's decision, comprise the last 133 pages of Volume III of the three volumes.

## JURISDICTION

The opinion and order of the court of appeals were entered on January 19, 1968 (Pet. App. xiii), and a petition for rehearing was denied on April 23, 1968. The petition for a writ of certiorari was filed on July 8, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Board properly found that the employer interfered with rights protected by the National Labor Relations Act (a) by posting a notice warning the employees that a union would not "work to your benefit but to your serious harm"; (b) by restricting employees to the wearing of one union insignia in the plant and discharging them for breaking this restriction; and (c) by soliciting employee signatures on a petition for a Board-supervised representation election.

2. Whether the Board properly found that the Union had, in connection with each of two work-stoppages, made unconditional applications for reinstatement, so that the refusal of the employer to reinstate the strikers violated the Act.

3. Whether substantial evidence supports the Board's finding that the employer, in effecting an economic reduction in work force, discriminatorily selected prominent union leaders for layoff because of their union activities.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in the Appendix, *infra*, p. 20.

## STATEMENT

The Board found[2] that petitioner violated Section 8(a)(1) of the Act by posting a notice threatening its employees with adverse consequences in the event of unionization, by unduly restricting employees to the wearing of one union insignia, and by soliciting employee signatures on an election petition. The Board also found that petitioner violated Section 8(a)(3) and (1) of the Act by temporarily refusing to reinstate two groups of striking employees, by discriminatorily selecting eight active union adherents for layoff in its jet engine field maintenance shop, and by temporarily discharging several dozen employees for wearing more than one union insignia. The Board ordered the petitioner to cease and desist from the unfair labor practices found; to make whole the strikers temporarily refused reinstatement for any loss of earnings suffered; to offer to reinstate and to make whole the employees discriminatorily laid off or dis-

[2] We discuss only the unfair labor practice findings now before this Court. The court below refused to enforce the Board's order in certain respects (Pet. App. ii-iv, xii), but the Board has not sought review of those rulings. In addition, petitioner disavows (Pet. 6) any attempt to seek review of certain aspects of the Board's decision sustained by the court below (see Pet. App. xii-xiii).

charged; and to post the customary notice (R. 1565-1570, 1603-1605).

The pertinent facts are as follows.

### A. The evidence.

#### 1. *The coercive notice*

Petitioner ("The Company") operates and maintains all facilities and equipment used in the pilot training program at Vance Air Force Base near Enid, Oklahoma and two auxiliary fields in the Enid area whose operations are fully integrated with those of the main base (R. 1475-1476; 771). In November 1960, organizational activity in behalf of the Union [3] began among the Company's employees. In response, the Company posted a notice, at or near its time clocks, which stated, *inter alia* (R. 1404-1408, 1479-1482; 1244):

> TO ALL EMPLOYEES
>
> * * * We have decided to state the Company's position on these subjects as clearly as we can for everybody alike:
>
> (1) This matter is, of course, one of concern to the Company. It is however, also a matter of serious concern to you and our sincere belief is that if this Union were to come into this Plant, it would not work to your benefit but to your serious harm.
>
> (2) It is our positive intention to oppose this Union and by every proper means to prevent it from getting in here.
>
> * * * *

[3] International Association of Machinists.

(6) No person will be allowed to carry on Union organizing activities on the job. Anybody who does so and who thereby neglects his own work or interferes with the ways of others will be subject to discharge.

* * * *

As a result of a Board-supervised election on May 6, 1964, a local of the Union was certified as the bargaining agent for a unit comprising the fire and rescue department (R. 1481-1482; 30-31). Shortly thereafter, and in violation of Section 8(a)(5) and (1) of the Act, the Company unilaterally changed certain terms of employment in the unit (R. 1483-1484; 30-37, 1380-1383; Pet. App. xii-xiii).

***2. The strikes and temporary refusals to reinstate***

(a) *The base shop employees.* Early in the summer of 1964, organizational activity increased to extend the Union's representation beyond the already certified fire-fighting unit (R. 1483-1484). Although Company supervisors coercively interrogated employees and threatened to discharge union leaders, in violation of Section 8(a)(1) of the Act (R. 1483-1486; 41-44, 169-170, 268-269, 523-525, 529-530; Pet. App. xii), the organizational activity continued.

On September 2 the Company discharged two union adherents for soliciting membership during working hours, in contravention of the no-solicitation rule embodied in the posted notice set forth *supra* (R. 1485-1488, 1493-1500, 1602-1603; 331-340, 543, 549-556, 574-577, 612-613, 683-685). On September 4, twenty-eight of the base shop employees went on strike to protest the discharges (R. 1499-1500; 355, 933,

1391).[4] That evening, however, the strikers authorized Union Representative Christian to make an offer to return to work on September 8, the next working day (R. 1501-1502; 356-357). Christian, on September 4, accordingly sent the Company a telegram which, after reciting the reasons for the walkout, concluded (R. 1501-1502; 1210):

> The Union is respectfully demanding that the Company cease and desist these unfair labor practices and to allow all concerned to return to their jobs without anymore retaliatory measures being taken against them because of their concerted action. An immediate reply as to the Company's intent is requested.

On the morning of September 8 the strikers appeared for work (R. 1501-1502; 357). The Company told them that "due to the rearranging of work schedules, we don't have any work for you" (R. 1501-1502; 358-359, 439). Later that day, Christian sent another telegram objecting to this "lockout," repeating the application for reinstatement of the strikers, asking that their time-cards be in the regular place, and stating that the strikers "will report to work tomorrow" and "desire to work but they want their legal rights respected" (R. 1503-1504; 1213). The Company notified each employee that he could return to work the following day (R. 1503-1504; 1214), and they did so (R. 1503-1504; 365, 441-442).

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[4] Earlier that day 26 employees in the maintenance shop had also struck, but the Board found they were subsequently returned to work without any infringement of their statutory rights (R. 1485-1488, 1495-1500, 1543-1546, 1549-1550, 1564, 1602; 331-340, 346-348, 928).

(b) *The fire-fighting employees.* Though negotiating with the Union in the certified fire-and-rescue-department-unit, the Company rejected a request to discuss certain grievances. As a result, 57 employees in that unit went on strike on September 14 (R. 1503-1508, 1511-1512; 1234, 1393). On September 15, however, Union Representative Christian sent a telegram to the Company, stating (R. 1509-1510; 1236):

> Be advised that the members of Smoke-Eaters Lodge 898 International Association of Machinists who would be customarily scheduled to work tomorrow Wednesday September 16, 1964 will report to work on their regular job and place and in their usual manner. Be further advised they are interested in returning to their jobs and remaining on their jobs as long as the company doesn't create new instances that would cause another disturbance.

The Company immediately responded by telegram, calling the Union's offer to return to work "conditional" and rejecting the firemen's offer to return to work the following morning (R. 1510; 1238). Christian sent telegrams on September 16 and 17 to the Regional Director of the Board complaining that Air Force personnel were being used as replacements to perform the fire fighting operation and stating that the firemen were "ready, willing and able to return to their jobs unconditionally" (R. 1510-1511; 1239-1240). On September 17, petitioner's president wired the Regional Director and Christian that it was the Company's position that the September 15 offer to

return was not acceptable because it was conditional (R. 1511-1512; 1241).

On September 16, seven of the firemen at one of the auxiliary fields made themselves available for work but were told by the Company that no work was available for them; they returned to their homes (R. 1511-1512; 462-464). At a conference between the parties later that day, in the presence of a Federal mediator, the offer to return to work was discussed and the Company representative again refused to accept the offer in the language of the Union's September 15 telegram (R. 1511-1512; 464-465). Finally, on September 17, language suitable to the Company was agreed upon, and, pursuant to the Company's acceptance of that offer, the firemen returned to work on September 18 (R. 1511-1512; 469-470, 477-478, 486).

### 3. *The restriction of employees to wearing one union insignia and discharge of employees for noncompliance*

During the height of the organizing campaign, the Union's supporters wore various badges indicating their allegiance.[5] By mid-October multiple-badge-wearing became the custom; the Company itself issued badges which indicated that "No Union [was] wanted", and which were worn by employees opposed to the Union as well as by Company officials (R. 1513, 1514; 121-122, 193, 198-199). In addition, for sev-

[5] Included were pencils bearing union insignia, worn in their pockets; plastic badges worn by shop stewards; improvised badges pasted on plastic buttons; and small signs worn by some employees on their backs (R. 1513-1514; 55-57, 116-118, 193-194).

eral months some of the employees had been wearing name tags attached to their shirts in addition to their union buttons (R. 1513-1514, 117-118, 123-124).

Between October 15 and 20 the Company discharged several employees who refused to remove small pro-union signs attached to their backs (R. 1513-1518; 64-68, 128, 141, 180-182). On October 20 the Company posted a notice which directed that only one button could be worn (R. 1515-1518; 1199). During the following week, more employees were discharged when they then refused to remove all but one union insignia, and in all approximately 50 employees were discharged on this ground (R. 1515-1520; 144-146, 151, 182, 218-221, 223-225, 1199, 1202, 1444). On October 27, however, the employees were reinstated and the Company posted a notice announcing that the single-badge rule was suspended pending determination of its legality by the Board (R. 1519-1520; 145-146, 1202).

#### 4. *Company solicitation of employee signatures to an election petition*

In late October 1964 two men found to have been Company supervisors signed and helped circulate a petition requesting that an election be conducted by the Board, explaining to employees that "we want to get an election; get this thing over with one way or another; we don't want no Union". By early January 1965 signatures had been obtained from approximately half of the Company's civilian employees on the base (R. 1519-1522; 104-105, 108-109, 204-205, 283-288, 426-428, 647-648, 1216-1218, 1220).

*5. The selection of eight active union leaders for layoff*

The Company's Aircraft Maintenance Program, administered by the Air Force, was altered in 1964, when it was decided that engines could be inspected after every 200 hours of use, rather than after every 100 hours. (R. 1523-1524; 942). After taking normal attrition into account, the Company decided that eight workers would have to be terminated as no longer necessary under the new procedure (R. 1523-1524; 948-950). As part of the plan for selection of candidates for layoff, Shop Superintendent Sprayberry and his assistant, Lolmaugh, used charts for job ratings by which each employee was evaluated numerically on various elements of job performance (R. 1525-1526; 1097-1098).[6] Employees with the lowest aggregate rating would be laid off. (R. 1525-1526; 1060-1061, 1208, 1209). All of the eight employees who were actually terminated in November 1964, had been designated stewards of the Union, had participated actively in the organization drive which began in early September, and had joined in the September walkouts (see *supra*, pp. 5-6). These employees, moreover, were not the eight with the lowest ratings (R. 1532). Additionally, it was stipulated that these employees had never seen the rating charts or been informed of their existence. With few excep-

[6] Provision was made for ratings ranging from poor (1) to outstanding (5) and based on the following objective and subjective categories: Seniority, Production, Job Ability, Initiative, Temperament, Job Attitude, Attitude Toward Supervisor, Acceptance of Rules and Regulations, and Harmony with Co-Workers.

tions, the men had not previously been the subjects of any disciplinary action (R. 1527-1531).

### B. The decisions below

In finding the various unfair labor practices specified *supra*, pp. 3-4, the Board rejected the Company's claims that the notice posted at the beginning of the organizational campaign was merely the permissible expression of views (R. 1540); that the strikers did not make unconditional and valid applications for reinstatement (R. 1547, 1550-1551); that the restriction to the wearing of one union insignia and the discharges for breach of that restriction were lawful (R. 1551-1555); that the Company's solicitation of employee signatures to an election petition did not interfere with organizational rights (R. 1555-1557); and that eight active union leaders were selected for layoff solely for nondiscriminatory reasons (R. 1557-1561).

The court of appeals sustained the Board findings and conclusions in these respects and, in relevant part, enforced the Board's order (Pet. App. i-xiii).[7]

## ARGUMENT

1. *The notice.* There is no merit to petitioner's claim (Pet. 7-12) that the Board improperly held that the Company violated Section 8(a)(1) of the Act by posting a notice to employees warning that the ad-

[7] While the court concluded that the notice was proper when originally posted in 1960, it agreed with the Board's ultimate finding that, in the context of the Company's activities in 1964, the notice was correctly found to constitute an unlawful threat of reprisal (Pet. App. iv-v).

vent of the Union would "operate to your serious harm" (*supra*, pp. 4-5). Compare *J. P. Stevens & Co.* v. *National Labor Relations Board*, 380 F. 2d 292 (C.A. 2), certiorari denied, 389 U.S. 1005.

Although some other courts have held that similar notices were not coercive (see Pet. 7), there is no true conflict since the results in those cases turn on their facts. In *Amalgamated Clothing Workers* v. *National Labor Relations Board*, 365 F. 2d 898, 910 (C.A. D.C.), where the context consisted only of isolated threats by low level supervisors, interrogation of a single employee by the plant manager, and an improper refusal to recognize the union's card majority, the court pointed out that "[t]he notice may take a different coloration by virtue of the accompanying circumstances." None of the earlier decisions of the Courts of Appeals for the Fourth and Sixth Circuits involved use of the notice in the context of other unfair labor practices as widespread and serious as those committed by the Company here.[8] In the pres-

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[8] *National Labor Relations Board* v. *Kayser-Roth Hosiery Co.*, 388 F. 2d 979 (C.A. 4) (two isolated violations of Section 8(a)(1)); *Wellington Mill Div., West Point Mfg. Co.* v. *National Labor Relations Board*, 330 F. 2d 579, 583-584 (C.A. 4) (court found only one violation of Section 8(a)(1)); *National Labor Relations Board* v. *Threads, Inc.*, 308 F. 2d 1, 8-9 (C.A. 4) (two violations of Section 8(a)(1) and one violation of Section 8(a)(3)); *Surprenant Mfg. Co.* v. *National Labor Relations Board*, 341 F. 2d 756, 758-760 (C.A. 6) (two Section 8(a)(1) violations). Cf. *National Labor Relations Board* v. *Southwire Co.*, 352 F. 2d 346, 347-348 (C.A. 5) (court found that language concerning "serious harm" to employees was wisely changed in later company notices, and concluded that "[u]nder these circumstances" the second notice did not violate the Act).

ent case, however, the import of the notice had to be evaluated in the climate of the Company's unlawful campaign to defeat the exercise of organizational rights—including, *inter alia*, its threats and coercive interrogations, its refusal to reinstate 85 strikers, its temporary discharge of approximately 50 employees who refused to comply with improper restrictions on wearing union insignia, and the discriminatory selection of 8 union leaders for layoff. And it was on this limited ground, *i.e.*, "[i]n the atmosphere existing in 1964," that the court below sustained the Board's finding, while agreeing that in a less hostile milieu the notice might not be coercive (Pet. App. iv).

Finally, we point out, the Fourth Circuit's most recent decision on the issue has squarely affirmed the principle relied on by the court below, although the court concluded that the Section 8(a)(1) violations found were not sufficient to give the notice a coercive import. *National Labor Relatons Board* v. *Greensboro Hosiery Mills, Inc.*, 68 LRRM 2702, 2704, No. 11,909, July 8, 1968.[9] Since these questions turn on an

[9] The Board does not view such notices as illegal *per se*, nor as invalidated simply by the existence of other unfair labor practices; it is only where these practices tend to impart a coercive overtone to the notice that the Board finds it unlawful. *Greensboro Hosiery Mills, Inc.*, 162 NLRB No. 108, 64 LRRM 1164. Contrary to petitioner's assertion (Pet. 8-11), the Board's more recent decision in *Allied/Egry Business Systems Inc.*, 169 NLRB No. 60, 67 LRRM 1195, is not a departure from the principle applied here. There the Board held that statements of the adverse consequences of unionization in a series of pre-election letters to the employes did not contain threats invalidating the election, especially when viewed against, *inter alia*, the nature of the union's campaign literature. Moreover, the case was a representation proceeding in

assessment of the significance of the peculiar facts in individual cases, judicial review is appropriately left to the courts of appeals. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474.

2. *The offers to return to work.* The court below properly affirmed the Board's finding (R. 1547, 1550-1551) that the Union made unconditional and effective applications for reinstatement of the two groups of strikers. Although the communications did express the desire that the Company refrain from any *future* conduct like that which had precipitated the walkout, both applications clearly stated that the strikers wanted to return to work immediately and would do so without capitulation by the Company on the strike issues. This willingness not to insist that the employer yield on the dispute which triggered the actual walkout is the essence of an unconditional application.[10] Moreover, as the court below noted (Pet. App. vi), the Union made unequivocal this unconditional willingness to end the strike by having the members report for work at their regular time; and yet, the Company barred them from working wholly on the unsupported ground that there was no available work (*supra*, pp. 6, 8).[11]

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which no menacing background of unfair labor practice conduct was in issue.

[10] See *Horace G. Prettyman*, 12 NLRB 640, 669-670. See, also, *National Shirt Shops of Florida, Inc.*, 105 NLRB 116, 129-131, enforced in pertinent part, 212 F. 2d 491, 494 (C.A. 5); *Southern Fruit Distributors, Inc.*, 109 NLRB 376, 391; *Hawaii Meat Company*, 139 NLRB 966, 970-971, enforcement denied on unrelated grounds, 321 F. 2d 397 (C.A. 9).

[11] Cf. *Colecraft Mfg. Co.* v. *National Labor Relations Board*, 385 F. 2d 998, 1005 (C.A. 2).

3. *The multiple badges.* The question whether the Company unlawfully restricted employees to wearing one union insignia and discriminatorily discharged employees for violating that restriction is governed by the principle enunciated by this Court in *Republic Aviation Corporation* v. *National Labor Relations Board*, 324 U.S. 793, 802 n. 7, that an employee has the right, free from employer interference, to wear union insignia while at work, and that only under special circumstances may an employer, because of pressing business considerations, limit this right. See *National Labor Relations Board* v. *Lone Star Textiles, Inc.*, 386 F. 2d 535, 536-537 (C.A. 5). Here again, the issue is essentially a factual one, and especially in view of the concurrent findings of the examiner, the Board, and the court below that no such special circumstances existed, further review by this Court is not warranted.

The record amply supports the determination that the Company had failed to establish special circumstances to justify its ban against multiple insignia. Thus, while the Company asserted that this restriction was necessary to maintain harmony and uninterrupted production in the plant, its action in distributing its own buttons and permitting its supervisors to wear "no union wanted" signs belied this claim. Nor was it shown how wearing more than one insignia enhanced the possibility of disruption (R. 1553-1554; 125-127). Equally without record support is the argument that multiple insignia increased the "foreign object" danger to jet engines serviced: all civilian and military personnel wore or were permitted to wear

plastic name tags affixed to their jackets with a pin (R. 1553-1554; 118, 123-124); employees working on jet engines carried pencils, steel rulers without clips, cigarette packs and other items in their shirt pockets (R. 1553-1554, 114-115, 123-124, 805, 856-857); the Company allowed multiple insignia for a month and a half without taking action or informing employees that it created undue safety hazards (R. 1553-1554; 118); the insignia restriction was applied to an employee whose duty was to operate a lawn mower and who had no contact with jet engines; and, the restriction attempted to bar signs taped on employees' backs but did not apply to tags or pencil clips or other items which under the Company's reasoning could have posed at least equal danger (R. 1553-1554; 418-420).

Neither of the two cases relied on by the Company (Pet. 17-22) is in conflict with the holding below. Both cases recognize that under *Republic Aviation* an employer may not ban multiple or unusual insignia unless "special circumstances" make it necessary in order to maintain production or plant discipline, and the circumstances found in those cases are critically distinguishable from the facts of this case. In *Caterpillar Tractors Co.* v. *National Labor Relations Board*, 230 F. 2d 357 (C.A. 7), the employer forbade the employees to wear buttons in the plant carrying the legend "Don't be a scab." The Seventh Circuit concluded the term "Scab" was inherently provocative and could lawfully be banned. Here, on the other hand, the insignia worn and the messages inscribed on employee clothing contained no such "fighting words"; moreover, they were of the same tenor as the anti-

union materials distributed by the Company to be worn by employees and supervisory personnel (*supra* p. 8). And, as the court below explained, the Seventh Circuit had recognized in *Caterpillar Tractor* that "an employer may not restrict 'passive inoffensive advertisement of organizational aims.'" (Pet. App. viii).

The facts in *Fabri-Tek, Inc.* v. *National Labor Relations Board*, 352 F. 2d 577, 586 (C.A. 8), are also distinguishable. There in the court's view, it was reasonable for the employer to regulate the wearing of "out-size" union insignia, and customary insignia when worn in an "extraordinary" way. The court noted that a high degree of concentration by the affected employees was essential for the precision required in producing the magnetic devices for computers, but that wearing oversize union buttons could well distract employees, and that there was "some evidence" of employee distraction when such buttons were worn. Moreover, the court saw this danger as aggravated by the competing of "rival union factions" in the plant. But, as the court of appeals has here observed (Pet. App. viii), the genuine employer concern over "danger to plant processes", found present in *Fabri-Tek*, is entirely absent from this present record.[12]

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[12] No conflict warranting review is created by the lower court's disagreement with *Fabri-Tek* insofar as the Eighth Circuit there stated that the wearing of over-size or multiple insignia is a form of "solicitation" and may be banned during working hours under *Republic Aviation* (Pet. 22, 28). Though the Eighth Circuit so characterized the unusual use of insignia

4. *The election petition.* The Board found that supervisory personnel had signed and sponsored a petition to bring about an immediate test of the Union's strength in a Board-supervised election, and had explained that the Company "want[ed] no union" (*supra*, p. 9). Whether such action resulted in prohibited management pressures on the employees' free exercise of organizational rights, as the Board found and the court below agreed, is purely a question of fact. *National Labor Relations Board* v. *Link-Belt Co.*, 311 U.S. 584, 598. As the court of appeals held (Pet. App. ix-x), in the context of anti-union animus and a variety of other unfair labor practices, the record fully supports the inference that the Company was engaged in an unlawful attempt to force a premature election while the consequences of its hostile campaign would be most effective.

5. *The layoffs.* Petitioner challenges the finding that the Company had applied its new system of job ratings in a way which discriminatorily selected eight union stewards and prominent organizational leaders for discharge. This argument turns solely on factual claims (Pet. 22-27) found unsupported at all stages of the proceedings (R. 1522-1534, 1557-1562, 1600-1601; Pet. App. xi). The assertion of error, there-

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in the circumstances presented, the court's ultimate holding rested on the principles stated above. Thus, the court stated "we further believe, however, that the company rule, as written and enforced, banning the wearing of unusual union insignia or usual union insignia in a unusual way is not in violation of the employees' rights under the Act because of special considerations and circumstances present in this case * * *" (352 F. 2d at 583).

fore, raises only an evidentiary issue which does not call for further review. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1968.

## APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * *

(c) The expressing of any views, arguments, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * *

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